

A Holee Holdings (M) Sdn Bhd v Chai Him & Ors

HIGH COURT (MELAKA) — ORIGINATING SUMMONS NO 24-132 OF 1995

AUGUSTINE PAUL JC

17 MAY 1997

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Equity — *Property, equitable interest in* — *Proprietary estoppel* — *Principles applicable*

Land Law — *Charge* — *Order for sale* — *Certificate of sale issued after conclusion of public auction, effect of* — *Whether upon registration of certificate of sale purchaser took land free and discharged from all liability under the charge* — *National Land Code 1965 s 267*

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Land Law — *Indefeasibility of title and interests* — *Registration, effect of* — *Plaintiff purchased property at public auction* — *Certificate of sale registered* — *Occupiers of property claiming equitable interest in property* — *Whether English equitable doctrines applicable* — *Whether plaintiff obtained indefeasible title on registration* — *National Land Code 1965 s 340*

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Land Law — *Sale of land* — *Priorities* — *Plaintiff purchased property at public auction* — *Certificate of sale pursuant to s 267 of the National Land Code 1965 issued to plaintiff* — *Sale registered* — *Occupiers of land claiming equitable interest* — *Equitable interest created without consent of chargee* — *Occupiers did not lodge caveat to protect alleged interest in land* — *Whether plaintiff should take property free from interest of occupiers*

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One Lim Low Tiew ('LLT') was the registered proprietor of certain lands ('the lands'). LLT created two charges over the lands in return for a loan from the Hongkong and Shanghai Banking Corp ('the bank') in 1978 which were duly registered. As LLT defaulted in the repayment of the loan, the bank commenced foreclosure proceedings and obtained an order for sale to sell the lands by public auction, which was held on 21 June 1989. The plaintiff was the successful bidder of the lands, and a certificate of sale in Form 16F of the National Land Code 1965 ('the NLC 1965') was issued to it by the senior assistant registrar of the High Court. The plaintiff was then registered as the proprietor of the lands. However, the plaintiff was confronted with several claims to rights over the lands. By notices to quit dated 7 December 1994, the plaintiff asked the first and second defendants to deliver vacant possession of the portion of the lands occupied by them on or before 1 March 1995. Both the defendants refused to comply with the notice. The plaintiff then filed this originating summons against them. The third to sixth defendants were added as parties on their intervention. The first defendant alleged that he had been allowed by LLT and her husband to occupy a portion of the lands and to build a house on it in 1957. The second defendant was a temple of which the third, fourth and fifth defendants were trustees. The third defendant alleged that LLT and her husband had encouraged him to put up the temple and had given him permission to do so. The sixth defendant was a worshipper at the

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temple. The substantial question raised in this case was the liability of a purchaser of land at a public auction by an order of court to persons claiming to be in occupation of the land with an equity. The following were the issues to be determined by the court, namely: (i) whether the plaintiff, as the successful bidder at the public auction of the lands, was bound by the equity of the third, fourth and fifth defendants, the occupiers of the lands, alleged to have been created subsequent to the registration of the charge under which the property was foreclosed, but before the lands were registered in the name of the plaintiff — ie whether s 267 of the NLC 1965 was applicable to the claim by the plaintiff against the defendants; (ii) whether the first and the second defendants had any equity in the lands or portion thereof. If so, whether the plaintiff was bound by the equity; (iii) whether the sixth defendant had a legal right of access to the temple and a legal right to remain there for religious purposes; (iv) whether the notices dated 7 December 1994 issued by the plaintiff's solicitors had validly and effectively terminated the equity of the defendants; and (v) if the plaintiff was bound by the equity of the defendants, how the equity was to be satisfied. The defendants also relied on condition 7 of the 'Conditions of Sale' with regard to the sale of the lands which stated that the property was sold subject to 'existing tenancies'.

Held, allowing the plaintiff's claim:

- (1) The rights of a chargee of any land were governed by s 340 of the NLC 1965. The said section conferred an indefeasible interest in the land on the chargee upon registration of the charge unless it was made defeasible by the other provisions in the same section. In the absence of any evidence to activate the exceptions contained in s 340 of the NLC 1965, the bank having registered the charges obtained an indefeasible interest which could not be defeated by the prior and subsequent equities of the third to the fifth defendants. The plaintiff, having been registered as the proprietor of the lands, also obtained an indefeasible interest (see pp 618D–620B); *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81, *Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd* [1988] 3 MLJ 54, *Perwira Habib Bank (M) Bhd v Oon Seng Development Sdn Bhd* [1990] 1 MLJ 447, *Buxton & Anor v Supreme Finance (M) Bhd* [1992] 2 MLJ 481, *Frazer v Walker & Ors* [1967] 1 All ER 649, *Bank Bumiputra Malaysia Bhd v Mahmud bin Hj Mohd Din (Datin Hajjah Salma bte Mohd Jamin, intervener)* [1989] 1 MLJ 381, *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101, *Associated Credit Corp Sdn Bhd v Fahlum Development Sdn Bhd & Anor* [1990] 2 CLJ 952, *Krishnadas & Ors v Maniyam* [1993] 3 MLJ 465, *PJT Denson (M) Sdn Bhd & Ors v Roxy (M) Sdn Bhd* [1980] 2 MLJ 136 and *Gondola Motor Credit Sdn Bhd v Almurisi Sdn Bhd* [1992] 2 MLJ 650 followed.

- A (2) Pursuant to s 259(3) of the NLC 1965, a successful purchaser at a public auction was entitled to a certificate of sale, which in this case was issued to the plaintiff. According to s 267 of the NLC 1965, upon registration of the certificate of sale, the purchaser was freed and discharged from all liability under the charge. Liability under the charge only referred to the obligation of the chargor to the chargee in respect of the charge and not to any other obligation attached to the title. However, s 267 was not exhaustive in spelling out the encumbrances that were binding on a purchaser who would also be bound by leases, sub-leases and tenancies which had been granted by the chargor in accordance with s 226 of the NLC 1965, ie with the consent of the chargee (see pp 620E–621G).
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- D (3) Pursuant to s 226 of the NLC 1965, LLT was not at liberty to grant any lease over the lands without the consent of the bank. The direct prohibition in the section could not be indirectly contravened by the creation of an equitable estoppel as that would conflict with an express statutory provision (see p 624B–C); *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221, *Hj Taib v Ismail* [1971] 2 MLJ 36, *United Malayan Banking Corp Bhd v Sykt Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352, *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314, *Lloyds Bank plc v Carrick* [1996] 4 All ER 630, *Chin Tai v Siow Show & Ors* [1971] 1 MLJ 67 and *Wong Kim Swee v Tham Hock Cham* [1981] 2 MLJ 207 followed. The equity of the third, fourth and fifth defendants, granted without the consent of the bank, did not confer any rights or interests against the bank and it was therefore not bound by it. Accordingly, the equity of the third, fourth and fifth defendants was not binding on the plaintiff (see pp 624E–625D); *Buxton & Anor v Supreme Finance (M) Bhd* [1992] 2 MLJ 481, *Ward v Kirkland* [1967] Ch 194, *Chalmers v Pardoe* [1963] 3 All ER 552, *Iron Trades Employer's Insurance Association v Union of House & Land Investors Ltd* [1937] 1 All ER 481 and *Dudley & District Benefit Building Society v Emerson & Anor* [1949] 2 All ER 252 followed.
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- H (4) The third, fourth and fifth defendants could not rely on condition 7 of the 'Conditions of Sale' which stipulated, inter alia, that the lands were sold subject to 'existing tenancies'. These words applied not only to tenancies but also to leases both legal and equitable which were binding on a chargee and purchaser in accordance with the provisions of the NLC 1965. In this case, since the equity of the defendants were not binding on the chargee bank, therefore it did not fall within the meaning of 'existing tenancies' in condition 7 (see p 626C–D); *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221 followed.
- I (5) The three elements that must be proved in order to establish a proprietary estoppel were assurance, reliance and detriment.

On the alleged equity of the first defendant, the only evidence available was that LLT had allowed him to occupy a portion of Lot 184 and to build a house on it in 1957. He had expended money in putting up the house and had planted fruit trees on the portion of lands occupied by him. However, there was no evidence to reach any conclusion that LLT had led the first defendant into the belief or expectation that upon him expending money in building the house he could remain there for as long as he liked or for a considerable length of time. The representation by LLT was not clear and unequivocal. Therefore, the first defendant had failed to establish that he had an equity over the portion of lands occupied by him (see pp 640H-641B); *Ramsden v Dyson* (1866) LR 1 HL 129, *Inwards v Baker* [1965] 2 QB 29, *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd* [1993] 3 MLJ 352, *Tan Khien Toong & Ors v Hoong Bee & Co* [1987] 1 MLJ 387, *Cheo Lean How v Fock Fong Looi* [1985] 2 MLJ 440 and *Charles Grenier Sdn Bhd v Tien Hee & Sons Sdn Bhd* [1980] 1 MLJ 184 followed; *Mok Deng Chee v Yap See Hoi & Ors* [1981] 2 MLJ 321 distinguished; *Willmott v Barber* (1880) 15 Ch D 96 not followed.

- (6) Although there was no evidence of an expectation of a precise legal term, the court might look at the circumstances and see whether there was an equity arising out of the expenditure of money. The extent of the expenditure and the nature of the construction might give an indication of the nature of the interest. In this case, no evidence was led by the first defendant on the expenditure incurred by him in order to facilitate an inference that he believed that he would be given an interest over the portion of lands occupied by him. The fact that the first defendant had been in occupation on his portion of the lands for an uninterrupted period of about 40 years was not sufficient on its own to found an equity in his favour on the facts of this case. Even if it could be argued that the first defendant had a valid equity, he had only an agreement for a lease which was capable of subsisting for only a maximum of 30 years and that would have been satisfied in 1987. Its termination was thus in accordance with law (see pp 641C-642D); *Siew Soon Wah & Ors v Yong Tong Hong* [1973] 1 MLJ 133, *Saadian bte Karim v Ong Ting Chai* [1996] 5 MLJ 646, *Ganesha Sdn Bhd v Chua Hock Chye* [1996] 5 MLJ 587 and *Bank Bumiputra Malaysia Bhd v Mahmud bin Hj Mohd Din (Datin Hajjah Salma bte Mohd Jamin, intervener)* [1989] 1 MLJ 381 followed.
- (7) The equitable doctrine of notice was incompatible with the NLC 1965. This was inevitable as the acceptance of such doctrine will rock the very foundation of the NLC 1965 with its s 340 which provided indefeasibility of title and s 323 which dealt with the caveat system (see p 645A-B); *Ong Chat Pang v*

- A *Valliappa Chettiar* [1971] 1 MLJ 224, *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449, *Eng Mee Yong & Ors v Letchumanan* [1970] 2 MLJ 212, *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81, *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85, *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12, *Yong Wee Ming v Chin Thian Guan* [1984] 1 MLJ 236 and *Than Kok Leong v Low Kim Hai* [1983] 1 MLJ 187 followed.
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- (8) On the assumption that the equities of the first to the fifth defendants were lawful, they could have caveated the portion of the lands occupied by them in order to protect their interests. The sixth defendant should have registered his right as an easement. Their failure to do so meant that the plaintiff would get a clean title as it was a bona fide purchaser for value (see pp 652H–653A); *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605, *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466, *Willmatt v Ilmenite Pty Ltd* [1993] ACL Rep 170 WA 3, *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng* [1995] 1 MLJ 719 and *Zeno Ltd v Prefabricated Construction Co (Malaya) Ltd & Anor* [1967] 2 MLJ 104 followed.
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- E (9) The applicability of English law on the binding effect of an equity on a successor in title must be qualified in the light of indefeasibility of title provided by s 340 of the NLC 1965 subject to the exceptions contained therein and the Torrens system of caveats (see p 653B–D); *Devi v Francis* [1969] 2 MLJ 169, *Errington v Errington* [1952] 1 KB 290, *Yong Tong Hong v Siew Soon Wah & Ors* [1971] 2 MLJ 105 and *Inwards v Baker* [1965] 2 QB 29 distinguished.
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- G (10) It was not necessary for the person giving a notice to quit to specify in it the manner of satisfying the equity. However, to obtain vacant possession, the termination of the tenancy was effective only when the equity, as ordered by the court, was satisfied after the notice. The service of the summons in this case was itself sufficient to terminate the licence (see p 658G–I); *Tool Metal Co v Tungsten Electric Co* [1955] 2 All ER 657, *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221, *Mok Deng Chee v Yap See Hoi & Ors* [1981] 2 MLJ 321 and *Khew Ah Bah v Hong Ah Mye* [1971] 2 MLJ 86 followed.
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[Bahasa Malaysia summary]

- I Seorang bernama Lim Low Tiew ('LLT') adalah pemilik berdaftar beberapa bidang tanah ('tanah tersebut'). LLT telah mewujudkan dua gadaian atas tanah tersebut sebagai balasan untuk suatu pinjaman daripada Hongkong and Shanghai Banking Corp ('bank tersebut') dalam tahun 1978 yang mana telah pun sempurna didaftarkan. Oleh kerana LLT ingkar dalam membayar balik pinjaman, bank tersebut telah memulakan prosiding halang tebus dan memperolehi perintah

jualan untuk menjual tanah tersebut melalui lelong awam, yang berlangsung pada 21 Jun 1989. Plaintiff merupakan pembeli yang berjaya membeli tanah tersebut dan sijil jualan dalam bentuk Borang 16F Kanun Tanah Negara 1965 ('KTN 1965') dikeluarkan kepadanya oleh penolong kanan pendaftar Mahkamah Tinggi. Plaintiff kemudian didaftarkan sebagai tuanpunya tanah tersebut. Walau bagaimanapun, plaintiff menghadapi beberapa tuntutan hak atas tanah tersebut. Melalui notis-notis keluar bertarikh 7 Disember 1994, plaintiff meminta defendan-defendan pertama dan kedua supaya menyerahkan milikan kosong bahagian tanah yang diduduki mereka pada atau sebelum 1 Mac 1995. Kedua-dua defendan enggan mematuhi notis itu. Plaintiff kemudiannya telah memfailkan saman pemula ini terhadap mereka. Defendan-defendan ketiga hingga keenam ditambahkan sebagai pihak-pihak atas permohonan mereka untuk mencelah. Defendan pertama mendakwa bahawa beliau telah dibenarkan oleh LLT dan suaminya untuk menduduki sebahagian tanah tersebut dan untuk membina sebuah rumah di atasnya pada 1957. Defendan kedua merupakan sebuah kuil yang mana defendan-defendan ketiga, keempat dan kelima merupakan pemegang amanah. Defendan ketiga mendakwa bahawa LLT dan suaminya telah mendorongnya untuk membina kuil itu dan telah memberikan kebenaran mereka. Defendan keenam adalah seorang penyembah di kuil itu. Soalan utama yang dibangkitkan dalam kes ini adalah berkenaan dengan liabiliti pembeli yang membeli tanah melalui lelong awam menurut perintah mahkamah kepada orang-orang yang mendakwa bahawa mereka menduduki tanah itu berdasarkan ekuiti. Berikut adalah isu-isu untuk dipertimbangkan oleh mahkamah, iaitu: (i) sama ada plaintiff, sebagai pembeli tanah yang telah berjaya di lelong awam, terikat dengan ekuiti defendan-defendan ketiga, keempat dan kelima, penduduk tanah tersebut, yang dikatakan telah diwujudkan berikutan pendaftaran gadaian di bawah mana tanah tersebut dihalang tebus, tetapi sebelum tanah tersebut didaftarkan atas nama plaintiff — iaitu sama ada s 267 KTN 1965 adalah terpakai kepada tuntutan plaintiff terhadap defendan-defendan; (ii) sama ada defendan-defendan pertama dan kedua mempunyai sebarang ekuiti ke atas tanah tersebut ataupun sebahagiannya. Jikalau ada, sama ada plaintiff terikat dengan ekuiti mereka; (iii) sama ada defendan keenam mempunyai hak akses di sisi undang-undang ke kuil itu dan hak undang-undang untuk terus tinggal di sana demi tujuan-tujuan agama; (iv) sama ada notis bertarikh 7 Disember 1994 yang dikeluarkan oleh peguamcara plaintiff telah menamatkan ekuiti defendan-defendan dengan sah dan berkesan; dan (v) jikalau plaintiff terikat dengan ekuiti defendan-defendan, bagaimana ekuiti tersebut hendak dipuaskan. Defendan-defendan juga telah bergantung kepada syarat 7 'Syarat-syarat Jualan' berkenaan dengan jualan tanah tersebut yang menyatakan bahawa tanah tersebut dijual tertakluk kepada 'penyewaan yang masih wujud'.

Diputuskan, membenarkan tuntutan plaintiff:

- (1) Hak-hak pemegang gadaian mana-mana tanah dikuasai oleh s 340 KTN 1965. Seksyen tersebut mengurniakan

- A kepentingan atas tanah yang tak boleh disangkal kepada pemegang gadaian sebaik sahaja gadaian didaftarkan melainkan jikalau kepentingan tersebut dipatahkan oleh peruntukan-peruntukan lain dalam seksyen yang sama. Dengan ketiadaan sebarang bukti untuk mengaktifkan kekecualian yang terkandung dalam s 340 KTN 1965, bank tersebut, setelah mendaftarkan gadaian-gadaian itu, telah memperoleh kepentingan tak boleh disangkal yang tidak boleh dikalahkan oleh ekuiti terdahulu dan ekuiti kemudian defendan-defendan ketiga hingga kelima. Setelah didaftarkan sebagai tuan punya tanah tersebut, plaintif juga telah memperoleh kepentingan yang tak boleh disangkal (lihat ms 618D–620B); *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81, *Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd* [1988] 3 MLJ 54, *Perwira Habib Bank (M) Bhd v Oon Seng Development Sdn Bhd* [1990] 1 MLJ 447, *Buxton & Anor v Supreme Finance (M) Bhd* [1992] 2 MLJ 481, *Frazer v Walker & Ors* [1967] 1 All ER 649, *Bank Bumiputra Malaysia Bhd v Mahmud bin Hj Mohd Din (Datin Hajjah Salma bte Mohd Jamin, intervener)* [1989] 1 MLJ 381, *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101, *Associated Credit Corp Sdn Bhd v Fahlum Development Sdn Bhd & Anor* [1990] 2 CLJ 952, *Krishnadas & Ors v Maniyam* [1993] 3 MLJ 465, *PfTV Denson (M) Sdn Bhd & Ors v Roxy (M) Sdn Bhd* [1980] 2 MLJ 136 dan *Gondola Motor Credit Sdn Bhd v Almurisi Sdn Bhd* [1992] 2 MLJ 650 diikuti.
- (2) Menurut s 259(3) KTN 1965, seorang pembeli yang berjaya di lelong awam adalah berhak menerima sijil jualan, yang mana dalam kes ini telah dikeluarkan kepada plaintif. Kesan sijil jualan ini tertera dalam s 267 KTN 1965. Sebaik sahaja sijil jualan didaftarkan, pembeli dibebaskan dan dilepaskan daripada segala liabiliti di bawah gadaian itu. Liabiliti di bawah gadaian tersebut hanya merujuk kepada kewajipan penggadaian kepada pemegang gadaian berkenaan dengan gadaian tersebut dan bukan kepada kewajipan lain yang terlampir kepada hakmilik. Namun demikian, s 267 bukan menyeluruh dalam menyenaraikan bebanan yang mengikat seseorang pembeli yang juga akan terikat dengan pajakan-pajakan, pajakan kecil dan penyewaan yang telah diberikan oleh penggadaian menurut s 226 KTN 1965, iaitu dengan persetujuan pemegang gadaian (lihat ms 620E–621G).
- (3) Menurut s 226 KTN 1965, LLT tidak mempunyai kebebasan untuk memberikan sebarang pajakan ke atas tanah tersebut tanpa persetujuan bank tersebut. Larangan terus dalam seksyen itu tidak boleh dilanggar secara tidak langsung dengan mencipta suatu ekuiti estoppel oleh kerana itu akan bertentangan dengan peruntukan statutori yang nyata (lihat ms 624B–C); *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221, *Hj Taib v Ismail* [1971] 2 MLJ 36, *United Malayan Banking Corp Bhd v Sykt Perumahan Luas Sdn Bhd (No 2)*
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[1988] 3 MLJ 352, *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314, *Lloyds Bank plc v Carrick* [1996] 4 All ER 630, *Chin Tai v Siow Show & Ors* [1971] 1 MLJ 67 dan *Wong Kim Swee v Tham Hock Cham* [1981] 2 MLJ 207 diikuti. Ekuiti defendan-defendan ketiga, keempat dan kelima, yang diberikan tanpa persetujuan bank itu, tidak mengurniakan apa-apa hak atau kepentingan terhadap bank itu dan ianya oleh itu tidak terikat dengan ekuiti itu. Maka ekuiti defendan-defendan ketiga, keempat dan kelima tidak mengikat plaintif (lihat ms 624E-625D); *Buxton & Anor v Supreme Finance (M) Bhd* [1992] 2 MLJ 481, *Ward v Kirkland* [1967] Ch 194, *Chalmers v Pardoe* [1963] 3 All ER 552, *Iron Trades Employer's Insurance Association v Union of House & Land Investors Ltd* [1937] 1 All ER 481 dan *Dudley & District Benefit Building Society v Emerson & Anor* [1949] 2 All ER 252 diikuti.

- (4) Defendan-defendan ketiga, keempat dan kelima tidak boleh bergantung kepada syarat ketujuh 'Syarat-syarat Jualan' yang menyatakan, antara lainnya, bahawa tanah tersebut dijual tertakluk kepada 'penyewaan yang masih wujud'. Perkataan-perkataan ini bukan sahaja terpakai kepada penyewaan tetapi juga kepada pajakan, sama ada yang sah di sisi undang-undang mahupun yang berekuiti yang mengikat seorang pemegang gadaian dan pembeli menurut peruntukan KTN 1965. Dalam kes ini, oleh kerana ekuiti defendan-defendan tidak mengikat pemegang gadaian (bank), maka ianya tidak termasuk dalam lingkungan maksud 'penyewaan yang masih wujud' dalam syarat ketujuh (lihat ms 626C-D); *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221 diikuti.
- (5) Tiga unsur yang mesti dibuktikan supaya mendirikan estoppel proprietari (kepunyaan) adalah jaminan, pergantungan dan kemudaratan. Berkenaan dengan ekuiti defendan pertama yang dikatakan itu, keterangan tunggal yang terdapat adalah bahawa LLT telah mengizinkan beliau menduduki sebahagian Lot 184 serta mendirikan sebuah rumah atasnya dalam tahun 1957. Beliau telah membelanjakan wang dalam mendirikan rumah tersebut dan telah menanam pokok buah-buahan di atas bahagian tanah yang didudukinya. Walau bagaimanapun, tidak ada bukti untuk menyimpulkan bahawa LLT telah mendorong defendan pertama supaya mempercayai atau menjangka bahawa setelah membelanjakan wang untuk mendirikan rumah itu, beliau boleh kekal di situ seberapa lama yang disukainya, ataupun untuk tempoh yang agak lama. Representasi yang dibuat oleh LLT adalah kabur dan tidak jelas. Oleh itu, defendan pertama telah gagal membuktikan bahawa beliau mempunyai ekuiti atas bahagian tanah yang didudukinya (lihat ms 640H-641B); *Ramsden v Dyson* (1866) LR 1 HL 129, *Inwards v Baker* [1965] 2 QB 29, *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd* [1993] 3 MLJ 352, *Tan Khien Toong & Ors v Hoong Bee & Co* [1987] 1 MLJ 387,

- A *Cheo Lean How v Fock Fong Looi* [1985] 2 MLJ 440 dan *Charles Grenier Sdn Bhd v Tien Hee & Sons Sdn Bhd* [1980] 1 MLJ 184 diikuti; *Mok Deng Chee v Yap See Hoi & Ors* [1981] 2 MLJ 321 dibeza; *Willmott v Barber* (1880) 15 Ch D 96 tidak diikuti.
- B (6) Walaupun tiada keterangan untuk menunjukkan bahawa terdapat suatu harapan mengikut undang-undang untuk satu tempoh masa yang pasti, mahkamah boleh merujuk kepada keadaan-keadaan untuk melihat sama ada terdapat ekuiti yang timbul akibat daripada perbelanjaan wang. Takat perbelanjaan dan jenis pembinaan boleh mungkin boleh memberikan tanda mengenai jenis kepentingan itu. Dalam kes ini, tidak ada sebarang keterangan dikemukakan oleh defendan pertama mengenai jumlah yang dibelanjakannya bagi membantu inferens bahawa dia telah mempercayai bahawa dia akan diberi kepentingan ke atas bahagian tanah yang didudukinya. Fakta bahawa defendan pertama telah bermastautin di bahagian tanah tersebut untuk satu tempoh tidak tergendala selama kira-kira 40 tahun tidak mencukupi dengan sendirinya untuk mendirikan satu ekuiti yang memihak kepadanya atas fakta kes ini. Biarpun dapat diujahkan bahawa defendan pertama mempunyai ekuiti yang sah, beliau hanya mempunyai satu perjanjian untuk satu pajakan yang boleh wujud hanya untuk 30 tahun dan ianya telah dipenuhi dalam tahun 1987. Penamatannya dengan itu adalah mengikut undang-undang (lihat ms 641C–642D); *Siew Soon Wah & Ors v Yong Tong Hong* [1973] 1 MLJ 133, *Saadian bte Karim v Ong Ting Chai* [1996] 5 MLJ 646, *Ganesha Sdn Bhd v Chua Hock Chye* [1996] 5 MLJ 587 dan *Bank Bumiputra Malaysia Bhd v Mahmud bin Hj Mohd Din* [1989] 1 MLJ 381 diikuti.
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- F (7) Doktrin notis ekuiti adalah tidak selaras dengan KTN 1965. Ini tidak dapat dielakkan kerana penerimaan doktrin tersebut akan menggugat asas KTN 1965 dengan s 340 yang memperuntukkan hakmilik tidak boleh sangkal dan s 323 yang merangkumi sistem kaveat (lihat ms 645A–B); *Ong Chat Pang v Valliappa Chettiar* [1971] 1 MLJ 224, *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449, *Eng Mee Yong & Ors v Letchumanan* [1970] 2 MLJ 212, *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81, *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85, *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12, *Yong Wee Ming v Chin Thian Guan* [1984] 1 MLJ 236 dan *Than Kok Leong v Low Kim Hai* [1983] 1 MLJ 187 diikuti.
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- I (8) Atas anggapan bahawa ekuiti-ekuiti defendan-defendan pertama hingga kelima adalah sah, mereka sepatutnya memasukkan kaveat ke atas bahagian tanah tersebut yang mereka duduki demi menjaga kepentingan mereka. Defendan keenam pula sepatutnya mendaftarkan hak beliau sebagai easemen.

- Kegagalan mereka berbuat demikian bermakna bahawa plaintif akan mendapat hakmilik bersih sebab ia adalah pembeli bona fide untuk nilai (lihat ms 652H-653A); *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605, *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466, *Willmatt v Ilmenite Pty Ltd* [1993] ACL Rep 170 WA 3, *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng* [1995] 1 MLJ 719 dan *Zeno Ltd v Prefabricated Construction Co (Malaya) Ltd & Anor* [1967] 2 MLJ 104 diikuti.
- (9) Pemakaian undang-undang England mengenai kesan mengikat ekuiti ke atas pewaris hakmilik mesti disyaratkan memandangkan ketakbolehsangkalan hakmilik yang diperuntukkan oleh s 340 KTN 1965 tertakluk kepada kekecualian yang terkandung dalamnya serta sistem kaveat Torrens (lihat ms 653B-D); *Devi v Francis* [1969] 2 MLJ 169, *Errington v Errington* [1952] 1 KB 290, *Yong Tong Hong v Siew Soon Wah & Ors* [1971] 2 MLJ 105 dan *Inwards v Baker* [1965] 2 QB 29 dibeza.
- (10) Adalah tidak perlu untuk seseorang yang mengeluarkan notis keluar untuk mengkhususkan cara bagaimana hendak memuaskan ekuiti itu. Namun demikian, untuk mendapat milikan kosong, penamatan penyewaan itu hanya berkesan apabila ekuiti itu, seperti yang diperintahkan oleh mahkamah, telah dipuaskan berikutan dengan notis itu. Penyampaian saman dalam kes ini dengan sendirinya mencukupi untuk menamatkan lesen (lihat ms 658G-I); *Tool Metal Co v Tungsten Electric Co* [1955] 2 All ER 657, *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221, *Mok Deng Chee v Yap See Hoi & Ors* [1981] 2 MLJ 321 dan *Khew Ah Bah v Hong Ah Mye* [1971] 2 MLJ 86 diikuti.]

Notes

For a case on the application of English equitable doctrines, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) para 1888.

For cases on the application of equitable principles, see 6 *Mallal's Digest* (4th Ed) paras 1651-1655.

For a case on competing interests, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) para 2675.

Cases referred to

Abigail v Lapin & Anor [1934] AC 491 (refd)

A-G of Hong Kong v Humphreys Estate (Queen's Garden) Ltd [1987] 2 All ER 387 (refd)

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770 (refd)

Alagappa Chetty v Ng Guan Yin 5 FMSLR 236 (refd)

Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd [1982] QB 84 (refd)

Andrews v Colonial Mutual Life Assurance Society Ltd [1982] 2 NZLR 556 (refd)

- A** *Associated Credit Corp Sdn Bhd v Fahlum Development Sdn Bhd & Anor* [1990] 2 CLJ 952 (folld)
Bachan Singh v Mahinder Kaur [1956] MLJ 97 (refd)
Bagdanovic v Koteff (1988) 12 NSWLR 472 (refd)
Baker v R [1975] AC 774 (refd)
- B** *Bank Bumiputra Malaysia Bhd v Mahmud bin Hj Mohd Din (Datin Hajjah Salma bte Mohd Jamin, intervener)* [1989] 1 MLJ 381 (folld)
Barry v Heider (1914) 19 CLR 197 (refd)
Basham (decd), Re [1986] 1 WLR 1498 (refd)
Beaton v MacDivitt (1987) 13 NSWLR 162 (refd)
Beesly v Hallwood Estate Ltd [1960] 2 All ER 314 (folld)
- C** *Bhimji v Salih* 4 February 1981, CA (unreported) (refd)
Binions v Evans [1972] 2 All ER 70 (refd)
Boonsom Boonyanit v Adorna Properties Sdn Bhd [1995] 2 MLJ 863 (refd)
Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12 (folld)
- D** *Bostock v Bryant* (1990) 61 P & CR 23 (refd)
Brikom Investments Ltd v Carr [1979] QB 467 (refd)
Builer v Fairclough (1917) 23 CLR 78 (refd)
Buxton & Anor v Supreme Finance (M) Bhd [1992] 2 MLJ 481 (folld)
Canadian Pacific Railway Co v R [1931] AC 414 (refd)
- E** *Chalmers v Pardoe* [1963] 3 All ER 552 (folld)
Charles Grenier Sdn Bhd v Tieng Hee & Sons Sdn Bhd [1980] 1 MLJ 184 (folld)
Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90 (refd)
Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352 (folld)
- F** *Cheo Lean How v Fock Fong Looi* [1985] 2 MLJ 440 (folld)
Chin Cheng Hong v Hameed & Ors [1954] MLJ 169 (refd)
Chin Tai v Siow Shiow & Ors [1971] 1 MLJ 67 (folld)
Chua Hee Hung v QBE Supreme Insurance Bhd [1990] 1 MLJ 480 (refd)
- G** *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 (refd)
Coombes v Smith [1986] 1 WLR 808 (refd)
Corbett v Plowden (1884) 25 Ch D 678 (refd)
Cowell v Rosehill Racecourse Co Ltd (1937) 56 CLR 605 (folld)
- H** *Crabb v Arun District Council* [1976] Ch 179 (refd)
Creelman & Anor v Hudson Bay Insurance Co [1920] AC 194 (refd)
Cullen v Cullen (1962) IR 268 (refd)
Damansara Jaya Sdn Bhd v Penghuni-Penghuni Kuil Muneswaran Alayam atau Kuil Muniandy Maha Kali Alayam [1994] 1 CLJ 164 (refd)
- I** *Damodaran v Vasudeva* [1974] 1 MLJ 128 (refd)
Devi v Francis [1969] 2 MLJ 169 (disd)
Dillwyn v Llewelyn (1862) 4 De GF & J 517 (refd)
Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85 (folld)
Drulroad Pty Ltd v Gibson (1992) NSW Conv R 55-637 (refd)

- Dudley & District Benefit Building Society v Emerson & Anor* [1949] 2 All ER 252 (folld) A
- E & L Berg Homes Ltd v Grey* (1979) 253 EG 473 (refd)
- Electrolux Ltd v Electrix Ltd* (1954) 71 RPC 23 (refd)
- Eng Mee Yong & Ors v Letchumanan* [1970] 2 MLJ 212 (folld)
- ER Ives Investments Ltd v High* [1967] 1 All ER 504, [1967] 2 QB 379 (refd) B
- Errington v Errington & Anor* [1952] 1 KB 290 (distsd)
- Ezekiel v Orakpo* 20 February 1980 (unreported) (refd)
- Fels v Knowles* (1906) 26 NZLR 604 (refd)
- Frazer v Walker & Ors* [1967] 1 All ER 649 (folld)
- Fung Kai Sun v Chan Fui Hung* [1951] AC 489 (refd) C
- Gan Tuck Meng & Ors v Ngan Yin Groundnut Factory Sdn & Anor* [1990] 1 MLJ 227 (refd)
- Ganesha Sdn Bhd v Chua Hock Chye* [1996] 5 MLJ 587 (folld)
- Goh Swee Fang v Tiah Juah Kim* [1994] 3 SLR 881 (refd)
- Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650 (folld) D
- Goo Hee Sing v Will Raja & Anor* [1993] 3 MLJ 610 (refd)
- Greasley & Ors v Cooke* [1980] 1 WLR 1306 (refd)
- Griffiths v Williams* (1978) 248 EG 947 (refd)
- Hj Taib v Ismail* [1971] 2 MLJ 36 (folld)
- Hasan bin Sui & Anor v Ban Ling Sdn Bhd & Ors* [1992] 3 CLJ 1428 (refd) E
- Haslemere Estate Ltd & Anor v Baker & Ors* [1982] 1 WLR 1109 (refd)
- Ho Hing Chye v Teh Cheong Huat* [1965] 2 MLJ 261 (refd)
- Holiday Inns Inc v Broadhead* (1974) 232 EG 951 (refd)
- Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221 (folld) F
- Hussey v Palmer* [1972] 1 WLR 1286 (refd)
- Inland Revenue Commissioner v Morris* [1958] NZLR 1126 (refd)
- Inwards v Baker* [1965] 2 QB 29 (folld, distd)
- Iron Trades Employer's Insurance Association v Union of House & Land Investors Ltd* [1937] 1 All ER 481 (refd) G
- Ismail bin Mohd v Hj Yahya & Ors* [1988] 2 MLJ 185 (refd)
- J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546 (refd)
- J Raju v Kwong Yik Bank Bhd* [1994] 2 MLJ 408 (refd)
- Josephson v Mason* (1912) 12 SR (NSW) 249 (refd) H
- Kalimuthu v S Kandiah* [1976] 2 MLJ 217 (refd)
- Kammings Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1970] 2 All ER 871 (refd)
- Khew Ah Bah v Hong Ah Mye* [1971] 2 MLJ 86 (folld)
- Krishnadas & Ors v Maniyam* [1993] 3 MLJ 465 (folld)
- KVS Maruguppa Chetty v Low Jow Dun* 4 FMSLR 87 (refd) I
- Lee Eng Teh & Ors v Teh Thiang Seong & Anor* [1967] 1 MLJ 42 (refd)
- Lee Lum Soh v Low Ngah* [1973] 1 MLJ 97 (refd)
- Leonard v James Hays Studio Pty Ltd* (1982) NSW Conv R 55-085

- A (refd)
Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449 (folld)
Liew Siew Yin & Anor v Lee Pak Yin & Anor [1940] MLJ 135 (refd)
Lim Teng Huan v Ang Swee Chuan [1992] 1 WLR 113 (refd)
- B
Ling Tee Huah Credit & Leasing Sdn Bhd & Ors v Lii Tat Credit Mortgage Sdn Bhd & Anor [1990] 1 MLJ 58 (refd)
Lloyds Bank plc v Carrick [1996] 4 All ER 630 (folld)
Lloyds Bank plc v Rosset [1990] 1 All ER 1111 (refd)
Loke Yew v Port Swettenham Rubber Co Ltd [1913] AC 491 (refd)
Lowe v Lombard Bank Ltd [1960] 1 All ER 611 (refd)
- C
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (folld)
Macon Engineers Sdn Bhd v Goh Hooi Yin [1976] 2 MLJ 53 (refd)
Mahadevan v Patel [1975] 2 MLJ 207 (refd)
Maharaj v Chand [1986] AC 898 (refd)
Margaret Chua v Ho Swee Kiew & Ors [1961] MLJ 173 (refd)
- D
Matharu v Matharu (1994) 68 P & CR 93 (refd)
Mercantile Credits Ltd v Shell Co of Australia Ltd (1976) 9 ALR 39 (refd)
Mohd Noor bin Othman & Ors v Hj Mohd Ismail bin Hj Ibrahim & Ors [1988] 3 MLJ 82 (refd)
Mohd bin Buyong v Pemungut Hasil Tanah Gombak & Ors [1982] 2 MLJ 53 (refd)
- E
Mok Deng Chee v Yap See Hoi & Ors [1981] 2 MLJ 321 (distd, folld)
Moorgate Mercantile Co Ltd v Twitchings [1976] QB 225 (refd)
Mulcahy v Hoyne (1925) 36 CLR 41 (refd)
National Provincial Bank Ltd v Ainsworth [1965] 2 All ER 472 (refd)
- F
Ng Kheng Yeow v Chiah Ah Foo & Ors [1987] 2 MLJ 330 (refd)
Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224 (folld)
Ong Heng Hwa Realty Sdn Bhd v Teoh Chai Siok [1977] 1 MLJ 124 (refd)
Ong Tin & Anor v Seremban Motor Garage [1917] 1 FMSLR 308 (refd)
- G
Ooi Ai Seng v Chan Lin Lam [1973] 2 MLJ 20 (refd)
Osmanoski v Rose [1974] VR 523 (refd)
Parker v Taswell 2 De G & J 559 (refd)
Paruvathy v Krishnan [1983] 2 MLJ 121 (refd)
Pascoe v Turner [1979] 1 WLR 431 (refd)
Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd [1988] 3 MLJ 54 (folld)
- H
Perwira Habib Bank (M) Bhd v Oon Seng Development Sdn Bhd [1990] 1 MLJ 447 (folld)
Phillips v Martin (1890) LR (NSW) 153 (refd)
PfTV Denson (M) Sdn Bhd & Ors v Roxy (M) Sdn Bhd [1980] 2 MLJ 136 (folld)
- I
Plimmer v The Mayor & Ors (1884) 9 App Cas 699 (refd)
Pok Kew Chai v Yeoh Thian Seng & Anor [1975] 1 MLJ 220 (refd)
Public Bank Bhd v Wan Leong Hup Kee [1992] 2 CLJ 1070 (refd)
R v Smith (1981) 113 DLR (3d) 522 (refd)
R v Warner 1 Keb 66 (refd)

- Ramsden v Dyson* (1866) LR 1 HL 129 (folld) A
RAP Nathan v Hj Abdul Rahman bin Hj Yusof & Ors [1980] 1 MLJ 249 (refd)
Registrar of Titles, Johore v Temenggong Securities Ltd [1976] 2 MLJ 44 (refd)
Registration of a Caveat, Re (1908) Innes 114 (refd) B
Rogers v Eller 20 May 1966, CA (unreported) (refd)
Rosman bin Hj Abdul Rashid v Rosmah Begum bte Bahadur Beg [1993] 2 MLJ 196 (refd)
Russell v Watts (1883) 25 Ch D 559 (refd)
Saadian bte Karim v Ong Ting Chai [1996] 5 MLJ 646 (folld)
Shaw & Anor v Applegate [1977] 1 WLR 970 (refd) C
Sidney Bolsom Investment Trust Ltd v E Karmios & Co (London) Ltd [1956] 1 QB 529 (refd)
Siew Soon Wah & Ors v Yong Tong Hong [1973] 1 MLJ 133 (folld)
Silovi Pty Ltd v Barbaro (1988) 13 NSWLR 466 (folld)
Standard Chartered Bank v Yap Sing Yoke & Ors [1989] 2 MLJ 49 (refd) D
Stevens v Stevens 3 March 1989, CA (unreported) (refd)
Stilwell v Simpson (1983) 133 NLJ 89 (refd)
Stratulatos v Stratulatos [1988] 2 NZLR 424 (refd)
T Damodaran v Choe Kuan Him [1979] 2 MLJ 267 (refd)
Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors [1983] 1 MLJ 81 (folld) E
Tan Khien Toong & Ors v Hoong Bee & Co [1987] 1 MLJ 387 (folld)
Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1982] QB 133 (folld)
Teh Bee v K Maruthamuthu [1977] 2 MLJ 7 (refd)
Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1993] 1 MLJ 443 (refd) F
Than Kok Leong v Low Kim Hai [1983] 1 MLJ 187 (folld)
Thomson and Chipps, Re; ex p Findlay (1886) 5 NZLR 52 (refd)
Tilakdhari Lal & Anor v Khedan Lal & Ors AIR 1921 PC 112 (refd)
Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd [1955] 2 All ER 657 (folld) G
United Malayan Banking Corp Bhd v Goh Tuan Laye & Ors [1976] 1 MLJ 169 (refd)
United Malayan Banking Corp Bhd v Development & Commercial Bank Bhd [1983] 1 MLJ 165 (refd)
United Malayan Banking Corp Bhd & Anor v Pemungut Hasil Tanah, Kota Tinggi [1984] 2 MLJ 87 (refd) H
United Malayan Banking Corp Bhd v Sykt Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352 (folld)
Voyce v Voyce (1991) 62 P & CR 290 (refd)
Waimiha Sawmilling Co Ltd (in liquidation) v Waione Timber Co Ltd [1926] AC 101 (folld) I
Ward v Kirkland [1967] Ch 194 (folld)
Watson v Goldbrough (1986) 1 EGLR 265 (refd)
Watts & Ready v Storey (1984) 134 NLJ 631 (refd)
Wellington City Council v New Zealand Law Society [1988] 2 NZLR 614 (refd)

- A *Willmatt v Ilmenite Pty Ltd* (1993) ACL Rep 170 WA 3 (folld)
Willmott v Barber (1880) 15 Ch D 96 (not folld)
Wong Kim Swee v Tham Hock Cham [1981] 2 MLJ 207 (folld)
Woo Yok Wan v Loo Pek Chee [1975] 1 MLJ 156 (refd)
Yong Tong Hong v Siew Soon Wah & Ors [1971] 2 MLJ 105 (distsd)
B *Yong Wee Ming v Chin Thian Guan* [1984] 1 MLJ 236 (folld)
Zeno Ltd v Prefabricated Construction Co (Malaya) Ltd & Anor [1967]
2 MLJ 104 (folld)

Legislation referred to

- C National Land Code 1965 ss 226, 256(3), 259(3), 267, 340
Native Land Trust Ordinance [Fiji] s 12
Specific Relief Act 1950 ss 3(c), 26(b)

- Kee Tong Kiak (Nik Hussain & Partners)* for the plaintiff.
Foo Nyong Tiam (Foo Nyong Tiam & Associates) for the first defendant.
D *Wong Kim Fatt and Ravinathan (Ravi Muthiah & Co)* for the second,
third, fourth and fifth defendants.
Tan Lip Yip (Tan Lip Yip & Co) for the sixth defendant.

Augustine Paul JC: The substantial question raised in this case is the liability of a purchaser of immovable property at a public auction held pursuant to an order of court under s 256(3) of the National Land Code 1965 ('the NLC 1965') to persons claiming to be in occupation of the property with an equity.

THE FACTS

- F Lim Low Tiew ('LLT') was the registered proprietor of land held under Geran Mukim 77, 78 and 11987 Mukim Batu Berendam, Melaka formerly known as Holding Nos 181, 184 and 185 Interim Register, Mukim Batu Berendam, Daerah Melaka Tengah, Melaka ('the lands'). She created two charges over the lands in favour of the Hongkong and Shanghai Banking Corp ('the bank') in 1978 in return for a loan and they were duly registered
G on 12 October 1978 vide presentation no 3753/78, vol 106, folio 28 and presentation no 3754/78, vol 106, folio 29 ('the charges'). As LLT defaulted in the repayment of the loan, the bank commenced foreclosure proceedings against her and obtained an order for sale on 2 February 1989 to sell the lands by public auction pursuant to s 256(3) vide Originating Summons
H No 31-338-86 (High Court, Melaka). The public auction was held on 21 June 1989 and the plaintiff was the successful bidder of the lands at a price of RM361,000. On 26 August 1989, LLT applied for and obtained an order from the High Court to set aside the order for sale. The bank then took the order to the (then) Supreme Court on appeal, which set it aside and confirmed the order for sale and the sale of the lands to the
I plaintiff. The plaintiff then paid the balance of the purchase price and a certificate of sale in Form 16F was duly issued to it on 13 September 1990 by the senior assistant registrar of the High Court. The plaintiff was then registered as the proprietor of the lands on 19 September 1990.

However, the plaintiff was confronted with several claims to rights over the lands. By notices to quit dated 7 December 1994, the plaintiff

asked the first defendant and the second defendant — a temple called ‘Ti Fang Fu’ — to deliver vacant possession of the portion of the lands occupied by them on or before 1 March 1995. They refused to comply with the notices. The plaintiff then ascertained that ‘Ti Fang Fu’ was not a registered body under the Societies Act 1966 and filed an originating summons (later converted into a writ) against both defendants. The third to sixth defendants were added as parties on their intervention.

The first defendant affirmed in his affidavit that as a result of his long friendship with LLT and her husband, he was allowed to occupy a portion of Lot 184 Interim Register, Mukim Batu Berendam, Melaka and to build a house on it in 1957. He had expended money in putting up the house and had planted fruit trees on the portion of the lands occupied by him. Two of his children were born in that house.

The second defendant did not file any affidavit in support of its case. As its role in the proceedings was effectively taken over by its trustees, the third, fourth and fifth defendants, its position would depend on the determination of their case.

The third defendant affirmed in his affidavit that he started working as a caretaker of the lands for Tan Seck Chee — the husband of LLT — in 1979. Around 1986, he started hearing voices asking him to build a temple at the portion of the lands that he occupied. Tan Seck Chee and his wife encouraged him to put up the temple and gave him permission to do so. With their consent, agreement and encouragement, he put up the temple at a cost of RM3,000 and became its caretaker. It was opened in August 1986. Many people came to pray there. He said that they told him that the portion of the lands on which the temple stood shall always remain the property of the temple and that if they sold the lands the rights of the temple shall not be affected. A house on the portion was allowed to be used by the third, fourth and fifth defendants. In 1989, the temple was expanded to an area of 120 feet by 150 feet with the encouragement, permission and consent of the owners of the lands. This involved an additional expenditure of RM5,000. LLT confirmed in her affidavit that she encouraged, agreed and consented to the erection of the temple on the lands and that no rent was collected for the use of the portion of the lands where the temple was erected. She affirmed in a further affidavit that she had agreed that the second defendant shall have permanent possession of the land.

The sixth defendant who is a worshipper in the temple did not file any affidavit in support of his case.

THE SUBMISSIONS

The parties agreed not to call any oral evidence and relied on the affidavits affirmed by them. They formulated the following issues for determination:

- (a) whether the plaintiff, as the successful bidder at a public auction of the lands, was bound by the equity of the third, fourth and fifth defendants — the occupiers of the lands — alleged to have been created subsequent to the registration of the charge under which the property was foreclosed, but before the lands were registered in the

- A name of the plaintiff, ie whether s 267 of the NLC 1965 is applicable to the claim by the plaintiff against the defendants;
- (b) whether the first and the second defendants had any equity to the lands or portion thereof. If so, whether the plaintiff was bound by the equity;
- B
 - (c) whether the sixth defendant had a legal right of access to the temple and a legal right to remain there for religious purposes;
 - (d) whether the notices dated 7 December 1994 issued by the plaintiff's solicitors had validly and effectively terminated the equity of the defendants; and
- C
 - (e) if the plaintiff was bound by the equity of the defendants, how the equity was to be satisfied.

D The issues framed by the parties revealed that they had agreed that the third, fourth and fifth defendants have an equity in the lands while there was no such agreement with regard to the alleged equity of the first and second defendants and the right of the sixth defendant. In the light of the findings that I am going to make, I do not consider it necessary to go into the merits of the agreed equity.

E The first defendant, in his submission, did not deny the rights of the plaintiff. He said that the plaintiff ought to have been aware of his existence as a ground tenant of the premises and was thereby bound by his equity. He said that not only must his tenancy be validly determined, his equity must also be satisfied. In his submission, learned counsel for the third, fourth and fifth defendants contended that s 267 was not applicable to the plaintiff's claim as this section was concerned solely with a tenancy exempt from registration.

F He added that the plaintiff had purchased the lands subject to the 'existing tenancies' as stated in condition 7 of the 'Conditions of Sale' and the plaintiff was thereby precluded from denying the equity. He said that the plaintiff must be deemed to have knowledge of the presence of the temple and the interveners before it purchased the lands and was therefore bound by their rights. He added that the equity created

G by the plaintiff was binding on his successors in title. He concluded by saying that where a person acquired a tenancy coupled with an equity, the owner could not recover vacant possession of his land by merely terminating the tenancy with a notice to quit but he must have also satisfied the equity, and that it was for the court to decide on the facts and circumstances of each case how the equity may be satisfied. He said that the equity could be

H satisfied by the sale to them of the portion of the lands occupied by them or, alternatively, by the grant of a lease for a period of 30 years. Learned counsel for the sixth defendant adopted the submissions of the other defendants and added that this court was duty bound to protect the fundamental right of his client to profess and practise his religion. He also,

I said that as the plaintiff had purchased the land with knowledge of the physical presence of the defendants, he was bound by their equities. In his submission, learned counsel for the plaintiff referred to s 267. He said that the equities, having been created after the registration of the charge and without the knowledge of the chargee, were not binding and as such, the

plaintiff had obtained a good title to the lands. He also referred to condition 7 of the 'Conditions of Sale' subject to which the plaintiff purchased the lands and said that the words 'existing tenancies' in the condition referred only to tenancies protected by s 267(2) and (3). He also said that the defendants' cause of action, if any, was against LLT for damages. With regard to the claim of the first defendant, he submitted that his equity had been sufficiently satisfied. He said that the rights of the sixth defendant were dependent on the outcome of the claims of the other defendants and added that his religious rights must be read subject to the property rights of the plaintiff.

THE POSITION OF THE SECOND TO THE SIXTH DEFENDANTS INDEFEASIBILITY OF TITLE

I shall first deal with the position of the second to sixth defendants and shall hereafter refer to the third, fourth and fifth defendants collectively as 'the defendants'. It is not in dispute that the equity of the defendants was created after the lands had been charged and duly registered under the relevant provisions of the NLC 1965. The submission of the defendants was on the basis that their equity is in the nature of a lease and I shall so proceed.

The rights of a chargee of any land are governed by s 340 of the NLC 1965 which reads as follows:

- (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
- (2) The title or interest of any such person or body shall not be indefeasible:
 - (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was party or privy; or
 - (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
 - (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
- (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-s (2):
 - (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
 - (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

- (4) Nothing in this section shall prejudice or prevent:
 - (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

- A (b) the determination of any title or interest by operation of law.

Section 340(1) confers an indefeasible interest in the land on the chargee upon registration of the charge unless it is made defeasible by the other provisions in the same section (see *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81; *Perwira Habib Bank (M) Bhd v Bank Bumiputra (M) Bhd* [1988] 3 MLJ 54; *Perwira Habib Bank (M) Bhd v Oon Seng Development Sdn Bhd* [1990] 1 MLJ 447; and *Buxton & Anor v Supreme Finance (M) Bhd* [1992] 2 MLJ 481). In *Frazer v Walker & Ors* [1967] 1 All ER 649, the Privy Council said that the expression 'indefeasibility' (per Lord Wilberforce at p 652):

- C ... is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever ... there are provisions by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims in personam.
- D These are matters not to be overlooked when a total description of his rights is required; but as registered proprietor, and while he remains such, no adverse claims (except as specifically admitted) may be brought against him.

In *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81, Abdul Hamid FJ (as he then was) said that the principle underlying the provisions of our NLC 1965, particularly on the effect of registration affecting the title or interest of a registered proprietor, is basically similar to that set out in a passage in *Waimiha Sawmilling Co Ltd (in liquidation) v Waione Timber Co Ltd* [1926] AC 101 which was adopted from the Court of Appeal case of *Fels v Knowles* (1906) 26 NZLR 604 at p 620 as follows:

- F The cardinal principle of the statute is that the register is everything, and that except in cases of actual fraud on the part of the person dealing with the registered proprietor such person upon the registration of the title under which he takes from the registered proprietor has an indefeasible title against all the world.

Stein and Ston in their book entitled *Torrens Title* said at p 87:

- G It involves the thesis that only those interests referred to on the Register are capable of binding other registered interests.

...

- H Under the Torrens System if A attains registration of an interest, without fraud, it will be free from all other interests except those which have previously been registered or which fall within the limited number of other exceptions

In *Frazer v Walker & Ors* [1967] 1 All ER 649, it was held that registration confers on a registered proprietor a title to the interest in respect of which he is registered immune from adverse claims other than those specifically excepted. Such immunity would extend to prior and subsequent interests.

I With regard to a prior interest, Peh Swee Chin J (as he then was) said in *Bank Bumiputra Malaysia Bhd v Mahmud bin Hj Mohd Din (Datin Hajjah Salma bte Mohd Jamin, intervener)* [1989] 1 MLJ 381 at p 382:

When the exceptions in the said s 340 do not apply as they did not apply to the instant case, the supervening title would defeat a prior equitable right or interest: *Ong Chat Pang v Valliappa Chettiar* [1971] 1 MLJ 224.

(See also *Associated Credit Corp Sdn Bhd v Fahlum Development Sdn Bhd & Anor* [1990] 2 CLJ 952; *Krishnadas & Ors v Maniyam* [1993] 3 MLJ 465; *PfTV Denson (M) Sdn Bhd & Ors v Roxy (M) Sdn Bhd* [1980] 2 MLJ 136). On the effect of a dealing entered into subsequent to registration, Harun Hashim SCJ, in writing for the Supreme Court in *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650, said at pp 658-659:

In any event, the fact of registration of the charge is notice to all the world of its existence. Any dealing subsequent to the charge and with notice of the charge, as here, cannot defeat the indefeasible interest of the registered chargee and through him the purchaser at a judicial sale.

In the absence of any evidence to activate the exceptions contained in s 340, the bank — having registered the charges — obtained an indefeasible interest which cannot be defeated by the prior and subsequent equity of all the defendants whatever be the extent of the interests. The plaintiff, having been registered as the proprietor of the lands, also obtained an indefeasible interest on the same grounds. Be that as it may, I shall proceed to consider the other issues raised by the parties in their submissions.

THE PLAINTIFF'S OBLIGATIONS AS THE PURCHASER AT A PUBLIC AUCTION

What now arises for consideration is the position of the plaintiff as the purchaser of the lands at a public auction. Section 259(3) of the NLC 1965 provides that a successful purchaser at a public auction is entitled to a certificate of sale. In this case, a certificate of sale was issued to the plaintiff. The effect of a certificate of sale is governed by s 267 which reads as follows:

- (1) Any certificate of sale given to a purchaser under sub-s (3) of s 259 or sub-s (4) of s 265 in respect of any charged land or lease shall be treated for all the purposes of this Act as an instrument of dealing, and shall be registrable accordingly under Pt 18; and, upon the registration thereof:
 - (a) the title or interest of the chargor shall pass to and vest in the purchaser, freed and discharged from all liability under the charge in question and any charge subsequent thereto; and
 - (b) subject to para (a) and sub-s (2), the relevant provisions of Pt 14 shall apply as if the chargor had transferred the land or lease to the purchaser in accordance with the provisions of that part.
- (2) Notwithstanding that it was granted with the consent in writing of the chargee, as required by sub-s (1) of s 226, no tenancy exempt from registration granted by the chargor after the date of registration of the charge shall be binding on the purchaser unless, prior to the date of registration of the certificate of sale, the tenancy had become protected by an endorsement on the register document of title to the land pursuant to Ch 7 of Pt 18.
- (3) The provisions of sub-s (2) shall have effect in addition to those of sub-s (3) of s 213, under which, by virtue of the fact that he claims

- A through the chargee, the purchaser will not be bound by any tenancy granted by the chargor before the date of registration of the charge unless it had become protected by endorsement prior to that date.

This section warrants some consideration as the plaintiff's case is anchored on it. It was the contention of learned counsel for the plaintiff that the words '... freed and discharged from all liability under the charge ...' in para (a) are wide enough to include the equity of the defendants with the result that it is freed and discharged. With respect, I am unable to agree as such a construction transcends the boundaries of the language of the section. What the words mean are what they plainly contemplate — that is to say, that the purchaser is freed and discharged from all liability under the charge. Liability under the charge only refers to the obligation of the chargor to the chargee in respect of the charge and not to any other valid obligation attached to the title. Thus, if the amount obtained on the sale is insufficient to satisfy the debt owed to the chargee the purchaser is in no way liable for the balance. The chargee's remedies will only be against the chargor on his personal covenant to pay. What really is of relevance to the plaintiff's case are the second part of paras (a), para (b) and sub-ss (2) and (3) of the section, which demonstrate the types of dealings in land that bind a purchaser. The second part of para (a) provides that the registration of the certificate of sale also acts to free the land from any other charge subsequent to the one in respect of which the purchase was made. Paragraph (b) provides that the sale shall operate as a transfer under Pt 14 of the NLC 1965 (see *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1995] 2 MLJ 863). Subsections (2) and (3) deal with the instances when a tenancy exempt from registration shall be binding on the purchaser. Generally stated, they are binding on the purchaser only if they had become protected by an endorsement on the register document of title to the land. The second part of para (a) and sub-ss (2) and (3) are not material to the facts of this case. However, s 267 is not exhaustive in spelling out the encumbrances that are binding on a purchaser. A purchaser will also be bound by leases, sub-leases and tenancies which have been granted by the chargor in accordance with s 226 which reads as follows:

- G (1) Where any alienated land, lease or sub-lease is subject to a charge, the proprietor, lessee or sub-lessee, as the case may be, shall not be capable of granting any lease, sub-lease or tenancy under this chapter without the consent of the chargee.
- (2) Except where it is contained in the instrument of charge itself, the consent of a chargee to the granting of any lease or sub-lease shall be signified by his joining therein as indicated in Form 15A or 15B, as the case may be, and his consent to the granting of any tenancy shall be given in writing, signed by him or his lawfully authorized agent.
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I A purchaser will be bound by a lease etc granted by the chargor in accordance with this section by virtue of the chargee having consented to its creation. The section is restricted in its operation to leases granted 'under this chapter'. That chapter is Ch 1 of Pt 15 of the NLC 1965 which deals with leases and tenancies and incorporates ss 221–228A. A 'lease' is defined in s 5 as a 'registered lease or sub-lease of alienated land'. Thus, s 226 applies only to registered leases under Ch 1 of Pt 15. I interpolate to

add that the words in s 226(1) that a proprietor etc '... shall not be capable of granting ...' a lease etc incapacitate him from doing so unless he has obtained the required consent.

WHETHER THE EQUITY OF THE DEFENDANTS CAN BE CREATED IN VIOLATION OF s 226?

The resultant matter of critical concern was whether the equity enjoyed by the defendants is also subject to the incapacity contained in s 226. It must first be observed that an equity of this nature may, in appropriate cases, be valid as an agreement for a lease enforceable in equity (see *Margaret Chua v Ho Swee Kiew & Ors* [1961] MLJ 173 and *Pok Kew Chai v Yeoh Thian Seng & Anor* [1975] 1 MLJ 220). This view is based on the authority of *Parker v Taswell* 2 De G & J 559. That case referred to the New South Wales case of *Josephson v Mason* (1912) 12 SR (NSW) 249, in which Cullen CJ said:

It was not disputed, and at this day it clearly could not be, that a contract for the granting of a lease would be binding upon the registered proprietor who made it, and that the Act would not stand in the way of a full recognition of such a contract, and the usual equitable incidents attached to it.

Equity will treat the defendants' right as an agreement for a lease of not more than 30 years as the right is only over a portion of the lands (see *Yong Tong Hong v Siew Soon Wah & Ors* [1971] 2 MLJ 105 affirmed by the Privy Council in *Siew Soon Wah & Ors v Yong Tong Hong* [1973] 1 MLJ 133). On a strict interpretation of s 226, the defendants' equity will not come within it as it was not one granted under Ch 1 of Pt 15 of the NLC. However, to hold that the section does not apply to such an equity would amount to according it a more exalted and elevated status than a legal lease. This in turn would mean that the equitable lease will conflict with an express statutory provision applicable to a legal lease and thereby negate the operation of a statute by indirectly recognizing a right which has been directly prohibited. It is settled law that any attempt to contract out of clear statutory provisions will be void and wholly ineffective as being contrary to public policy (see *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221). In *Hj Taib v Ismail* [1971] 2 MLJ 36, Syed Agil Barakbah J (as he then was) said at p 39:

In the present case, as I have pointed out earlier, there cannot be a contractual licence because the parties apart from having contracted outside the Ordinance also contravened the provisions of the Ordinance which rendered the contract void and unenforceable at law. In this respect, I am of opinion that the maxim 'equity follows the law' applies, in the sense that a court of equity will not attempt to enforce a covenant which is void at law (see 14 *Halsbury's Laws* (3rd Ed) p 526). 'Where a rule, either at the common or statute law, is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify, a departure from it' (see *Snells' Principles of Equity* (26th Ed) p 26).

In *United Malayan Banking Corp Bhd v Sykt Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352, Edgar Joseph Jr J (as he then was) said at p 356:

In these circumstances, the charge having been registered in breach of an explicit statutory prohibition imposed on the title to the charged land

- A pursuant to the provisions of s 120 of the NLC 1965, the title or interest of the chargee is defeasible since registration thereof had been obtained by means of an insufficient or void instrument (s 340(2)(b)) and also because the Registrar of Titles, in registering the charge, had acted ultra vires the powers conferred upon him: s 340(2)(c). The defence of estoppel accordingly fails since there cannot be an estoppel to evade the plain provisions of a statute: *Jagabandhu v Radha Krishna* ILR 36 Cal 920, particularly when as here, the non-compliance goes to the root of the thing. In other words, if the terms of a statute are absolute and do not admit of any relaxation or exemption, anything done in contravention thereof, will be ultra vires and no person can be estopped from putting forward the contention that what was done was illegal or void: *University of Delhi v Ashok Kumar Chopra* AIR 1968 Delhi 131.
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Accordingly, no court is at liberty to enforce as valid, that which a statute has declared shall not be valid nor can compliance therewith be dispensed with even by consent of the parties or by failure to plead or argue the point at the onset: *Surajmull v Triton Insurance Co Ltd* AIR 1925 PC 83.

- D In *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314, Buckley J said at p 324:

On this part of the case counsel for the plaintiff referred me to *Central London Property Trust Ltd v High Trees House Ltd* [1956] 1 All ER 256; *Hughes v Metropolitan Ry Co* (1877) 2 App Cas 439 and to the statement derived from *Combe v Combe* [1951] 1 All ER 767 which is contained in 15 *Halsbury's Laws* (3rd Ed) p 175. As I understand this part of the law, which has been described as promissory estoppel, it is that where one party is under an existing legal obligation to another, who has so acted as to lead the former party to believe that the latter will not enforce that obligation, or not enforce it to its full extent, or for the time being, intending the former party to act on that footing, and the former party has so acted, the latter party may be restrained in equity from enforcing the obligation on any footing inconsistent with the belief so induced and may be so restrained notwithstanding that he had received no consideration for the modification of his rights. The doctrine may afford a defence against the enforcement of otherwise enforceable rights; it cannot create a cause of action. *It cannot, in my judgment, be invoked to render enforceable a right which would otherwise be unenforceable, nor to negative the operation of a statute* (see 15 *Halsbury's Laws* (3rd Ed) p 176). (Emphasis added.)

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In *Lloyds Bank plc v Carrick* [1996] 4 All ER 630, it was held that a proprietary estoppel over an interest cannot be created indirectly when its direct creation has been prohibited by statute. Morritt LJ said at pp 641–

- H 642:

Section 4(6) of the 1972 Act invalidates, as against the bank, any unregistered contract by the estate owner for the conveyance of the legal estate. It cannot be unconscionable for the bank to rely on the non-registration of the contract. I do not see how it could be right to confer on Mrs Carrick indirectly, and by means of a proprietary estoppel binding on the bank, that which Parliament prevented her from obtaining directly by the contract it has declared to be void.

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Finally, I refer to *Ezekiel v Orakpo* 10 February 1980 (unreported) — available on Lexis — where it was held that the right or interest assumed must be one

within the legal owner's capacity to grant in order to found a proprietary estoppel. In that case, Brightman LJ said:

I think one has to ask oneself, what was the spender relying on? Was he relying on an interest to which he was entitled or on an interest which he could not get without the concurrence of the landowner? If the latter is right, the question then arises whether the circumstances are such that it would be inequitable for the landowner to withhold his concurrence. But if the spender of the money is not relying on an interest which the landowner can give or withhold, then there is no place for the equity ... (The claimant) fails that test, because there is no evidence that he was relying on some interest which the landlord was at liberty to give or withhold during the period of the option, which was the time when the expenditure was made.

Pursuant to s 226, LLT was not at liberty to grant any lease over the lands without the consent of the bank. The direct prohibition in the section cannot be indirectly contravened by the creation of an equitable estoppel. That would conflict with an express statutory provision. As the right granted to the defendants was not one which was within the capacity of LLT to grant, an equitable estoppel cannot arise in violation of the section to bind the chargee.

I shall now consider in more detail the effect of a lease granted without obtaining the required consent as stipulated in s 226 both at law and in equity. It has been held that the registration of a charge in breach of an explicit statutory prohibition imposed on the title to the charged land would mean that it is void as against the chargee (see *United Malayan Banking Corp Bhd v Sykt Perumahan Luas Sdn Bhd* (No 2) [1988] 3 MLJ 352; *Chin Tai v Siow Shiow & Ors* [1971] 1 MLJ 67 and *Wong Kim Swee v Tham Hock Cham* [1981] 2 MLJ 207). In *Buxton & Anor v Supreme Finance (M) Bhd* [1992] 2 MLJ 481, it was held that where the consent of the chargee was required before the chargor could deal with the land, any dealing made by the chargor without such consent cannot confer any rights or interests against the chargee (see also *Public Bank Bhd v Wan Leong Hup Kee* [1992] 2 CLJ 1070). The position is the same whether the lease granted under such circumstances is legal or equitable (see *Corbett v Plowden* (1884) 25 Ch D 678). *Ward v Kirkland* [1967] Ch 194 supports the view that where consent is required for the conveyance of any interest in land, an equity cannot be raised without such consent. In *Chalmers v Pardoe* [1963] 3 All ER 552, s 12 of the Native Land Trust Ordinance of Fiji rendered it unlawful for a tenant under the Ordinance to 'alienate or deal with' land comprised in a lease without the consent of the Native Land Trust Board. The appellant, with the consent of his friend, the respondent, who held such a lease, built a house on part of the leased land without the Board's consent, the respondent saying that he would apply to the Board to allow an underlease or the grant of a new lease to the appellant. Later, the respondent changed his mind and the appellant sued him for a declaration of a charge or lien on the land for the amount expended. The Privy Council held that, although equity would normally intervene to prevent the respondent from going back on his word and taking the building for nothing, nevertheless a 'dealing' with the land had taken place and since prior consent of the Board was not obtained, that dealing (under s 12 of the Ordinance) was unlawful and equity could not lend its aid to the appellant. Accordingly, the appellant was not entitled to

- A an equitable lien or charge for the amount expended. In *KVS Maruguppa Chetty v Low Jow Dun* 4 FMSLR 87 — where the chargee's consent was not obtained prior to executing a lease — it was held that the chargee's consent to a lease was necessary and that as that consent had not been obtained, the right of the chargee took priority over the rights of the lessee.
- B In *Pok Kew Chai v Yeoh Thian Seng & Anor* [1975] 1 MLJ 220, it was held that a lease which was granted without the consent of the chargee under s 226 operated as an agreement for a lease in equity but as between the equitable lessee and the chargee it was the chargee's interest which must take precedence. Thus the equity would be good against the chargor though not against the chargee nor through him the purchaser (see *Iron Trades Employer's Insurance Association v Union of House & Land Investors Ltd* [1937] 1 All ER 481 and *Dudley & District Benefit Building Society v Emerson & Anor* [1949] 2 All ER 252). As s 267(1)(b) provides that upon registration of the certificate of sale the relevant provisions of Pt 14 of the NLC 1965 shall apply as if the chargor had transferred the land to the purchaser in accordance with the provisions of that Part, it follows that the rights of the plaintiff will be governed by the express provisions in the NLC 1965. It is therefore my view that the equity of the defendants — though not granted in accordance with s 221 — is capable of binding the plaintiff only if it had been granted as required by s 226; that is to say, the chargee must have consented to its creation. The corollary is that the equity of the defendants, granted without the consent of the chargee, does not confer any rights or interests against the chargee and it is therefore not bound by it. Accordingly, the equity of the defendants is not binding on the plaintiff.

CONDITION 7 OF THE CONDITIONS OF SALE

- F I now refer to the defendants' reliance on condition 7 of the 'Conditions of Sale' with regard to the sale of the lands which reads as follows:

The property is sold subject to *existing tenancies*, all quit, ground and other rents (if any), incidents of tenure, rights of way, water, drainage, light and other easements and rights of adjoining owners, if any, affecting the same and to liability to repair or contribute to the repair of roads, ways, passages, drains, fences and other like matter and subject to all improvement schemes or back lanes schemes or other schemes or proposal of government or local or other authority or body and all reservations of land for roads or road widening. (Emphasis added.).

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- H It was argued by the defendants that the words 'existing tenancies' in the condition also referred to the equity of the defendants and that the plaintiff was thereby bound by it. This argument was advanced to the High Court in *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221 where the proclamation of sale contained, inter alia, the following condition of sale:

- I (8) the properties are sold subject to all existing tenancies, if any, and all claims of tenants and occupiers by contract, custom, statute or otherwise.

At first glance, it would appear that the ambit of this condition is wide enough to include an equity as in the case before me. However, Edgar Joseph Jr J (as he then was) in construing the condition said at p 225:

It makes no difference that condition 8 of the proclamation of sale provides that the disputed property was sold subject to all existing tenancies, if any, and all claims of tenants and occupiers by contract, custom, statute or otherwise. This condition must be understood to refer only to tenancies binding on the purchasers. Short tenancies of less than three years not protected by endorsement under s 316(1) of the Code, are not binding on the purchasers, and are obviously excluded from the contemplation of condition 8. In any event, any attempt to contract out of clear statutory provisions aforesaid would be void and wholly ineffective as being contrary to public policy. A B

The Supreme Court agreed with this reasoning (see [1991] 1 MLJ 404) and Hashim Yeop A Sani CJ (Malaya), in speaking for the court, said at p 409: C

We agree with the learned judge that the words 'all existing tenancies' mean only tenancies protected by the Code.

In my opinion, the words 'existing tenancies' in the condition apply not only to tenancies but also to leases both legal and equitable which are binding on the chargee and through it the purchaser in accordance with the provisions of the NLC 1965. As I have said in an earlier part of the judgment, the equity of the defendants is not binding on the chargee. Thus it does not fall within the meaning of 'existing tenancies' in condition 7. The defendants are therefore precluded from seeking refuge under condition 7 as their equity is not binding on the plaintiff. D E

CUSTOMARY LAW

Finally, it is my view that the defendants' reliance on *Damansara Jaya Sdn Bhd v Penghuni-Penghuni Kuil Muneswaran Alayam atau Kuil Muniandy Maha Kali Alayam* [1994] 1 CLJ 164 cannot be sustained. In that case, it was held that under customary Hindu Law, it was well established that if a landowner sets apart land which he owns for the establishment of a temple which the public use for worship over a long course of time, a trust of that land will be deemed to have been expressly or impliedly created. The defendants submitted that a similar right should be accorded to them in respect of their temple. As the case does not appear to have been finally concluded, it may not be appropriate for me to make any comment on it at this stage. It is sufficient for me to say that that case was concerned with customary Hindu Law with regard to land being set aside for the establishment of a Hindu temple while the case before me involves a Chinese temple. It will not be lawful to use customary Hindu Law in respect of non-Hindu customary rights. No evidence was adduced before me on the existence of similar Chinese customary rights. F G H

THE FINDING

The issues raised by the defendants must therefore fail. As the claims of the second and sixth defendants are dependent on the claim of the defendants, their claim must also fail. Furthermore, the second defendant being unlawful for failure to be registered under the Societies Act 1966 is not entitled to a declaration in its favour (see *Mohd Noor bin Othman & Ors v Hj Mohd Ismail bin Hj Ibrahim & Ors* [1988] 3 MLJ 82). In any I

A event, as the interests of the second to the fifth defendants were created subsequent to the registration of the charge, they are not binding on the chargee and through it the plaintiff. I shall consider later the manner in which all the defendants could have protected their respective interests and right.

B **THE POSITION OF THE FIRST DEFENDANT**

THE LAW

That leaves the position of the first defendant for consideration, that is to say, whether his occupation on his portion of the lands is coupled with an equity. The starting point for a determination of this issue is *Ramsden v*

C *Dyson* (1866) LR 1 HL 129, where Lord Cranworth said at pp 140–141:

If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.

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But it will be observed that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or

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passive, making it inequitable in me to assert my legal rights.

In his dissenting judgment in that case, Lord Kingsdown said at pp 170–171:

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The rule of law applicable to the case appears to me to be this If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v Mighell* 18 Ves 328, and, as I conceive, is open to no doubt.

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If, at the hearing of the cause, there appears to be such uncertainty as to the particular terms of the contract as might prevent a court of equity from giving relief if the contract had been in writing, but there had been no expenditure, a court of equity will nevertheless, in the case which is above stated, interfere in order to prevent fraud, though there has been a difference of opinion amongst great judges as to the nature of the relief to be granted. Lord Thurlow seems to have thought that the court would ascertain the terms by reference to the Master, and if they could not be ascertained, would itself fix reasonable terms. Lord Alvanley and Lord Redesdale, and

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perhaps Lord Eldon, thought this was going too far; but I do not understand any doubt to have been entertained by any of them that, either in the form of a specific interest in the land, or in the shape of compensation for the expenditure, a court of equity would give relief, and protect in the meantime the possession of the tenant.

If, on the other hand, a tenant being in possession of land, and knowing the nature and extent of his interest, lays out money upon it in the hope or expectation of an extended term or an allowance for expenditure, then, if such hope or expectation has not been created or encouraged by the landlord, the tenant has no claim which any court of law or equity can enforce. This was the principle of the decision in *Pilling v Armitage* 12 Ves 78, and like the decision in *Gregory v Mighell*, seems founded on plain rules of reason and justice.

The statement by Lord Kingsdown was approved by the Privy Council in *Plimmer v The Mayor & Ors* (1884) 9 App Cas 699. In doing so, Sir Arthur Hobhouse in delivering the advice of the Board said at p 711:

This case of *Ramsden v Dyson* was strongly pressed in argument against the conclusion to which their Lordships have come, and it was said that Lord Cranworth's judgment, which represented the opinion of the majority, lays it down that an equity of the sort now relied on cannot be raised unless the occupant who improves the land believes it to be his own, and the owner of the improved land knows of that mistaken belief. But there was no disagreement among the judges on the principles of law laid down in that case. Only Vice-Chancellor Stuart first, and after him Lord Kingsdown, drew from the evidence inferences of fact at variance with those drawn by the majority of the House, and so brought out a different legal conclusion.

In *Crabb v Arun District Council* [1976] Ch 179, Lord Denning MR and Scarman LJ shared the view that the point of dissent in *Ramsden v Dyson* was not on the law but on the facts. Thus the speeches of Lord Cranworth and Lord Kingsdown are both statements of law on the different circumstances in which an equity can arise. In *Inwards v Baker* [1965] 2 QB 29, the defendant was encouraged by his father to build his house on the latter's property. With such encouragement, the defendant built his house there and lived there continuously in the expectation and belief that he would be allowed to remain there for his lifetime or for so long as he wished. He lived there for a number of years. When his father died, the personal representatives of the father's estate commenced proceedings against him to recover possession of the property. The Court of Appeal held that he had an equity to stay in that house for as long as he wished it to remain his home. Lord Denning MR, after referring to the statement of law enunciated by Lord Kingsdown in *Ramsden v Dyson* (1866) LR 1 HL 129, said at pp 36-37:

It is quite plain from those authorities that if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity.

And later at p 37:

In this case, it is quite plain that the father allowed an expectation to be created in the son's mind that this bungalow was to be his home. It was to

A be his home for his life or, at all events, his home as long as he wished it to remain his home. It seems to me, in the light of that equity, that the father could not in 1932 have turned to his son and said: 'You are to go. It is my land and my house.' Nor could he at anytime thereafter so long as the son wanted it as his home.

B Mr Goodhart put the case of a purchaser. He suggested that the father could sell the land to a purchaser who could get the son out. But I think that any purchaser who took with notice would clearly be bound by the equity. So here, too, the present plaintiffs, the successors in title of the father, are clearly themselves bound by this equity. It is an equity well recognized in law. It arises from the expenditure of money by a person in actual occupation of land when he is led to believe that, as the result of that expenditure, he will be allowed to remain there.

In *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225, Lord Denning MR said at p 241:

(Estoppel) is a principle of justice and of equity. It comes to this: when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.

However, the doctrine of estoppel as presently understood took a turn in *Willmot v Barber* (1880) 15 Ch D 96. In that case, Fry J put forward the five 'probanda' which must be present in order to establish an estoppel at pp 105-106 in the following terms:

F It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent, with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal rights, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do.

I These propositions were adhered to and confirmed by Fry J in *Russell v Watts* (1883) 25 Ch D 559. In *Mulcahy v Hoyne* (1925) 36 CLR 41, Knox CJ said at p 51:

In order to raise an estoppel against a person who stands by while his legal right is being infringed, it must be shown that the person setting up the estoppel was mistaken as to his own legal rights, for, if he is aware that he

is infringing the legal rights of another he takes the risk of those rights being asserted

The 'probanda' were approved of by Scarman LJ in *Crabb v Arun District Council* [1976] Ch 179 and noted as positively indispensable in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1970] 2 All ER 871. They were applied in *Coombes v Smith* [1986] 1 WLR 808.

The trend in England now is to depart from the five probanda established in *Willmott v Barber* (1880) 15 Ch D 96 and to apply a broader formulation based on unconscionability. In *Shaw & Anor v Applegate* [1977] 1 WLR 970 at pp 977 and 978, Buckley LJ interpreted Fry J's 'probanda' in *Willmott v Barber* (1880) 15 Ch D 96 as meaning that:

... where a man has got a legal right ... acquiescence on (his) part will not deprive (him) of that legal right unless it is of such a nature and in such circumstances that it would really be dishonest or unconscionable of (him) to set up that right after what has occurred.

His Lordship then said that it may be 'open to doubt' whether in order to reach that conclusion, it was really necessary to comply strictly with all the five probanda. In his view, it was not essential to find all the five 'probanda' strictly applicable and satisfied in any particular case. The real test, as his Lordship said at p 978, was:

... whether upon the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it.

The liberalized approach gained momentum following the judgment of Oliver J in *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133, where his Lordship said at pp 148 and 151-152:

I am not at all convinced that it is desirable or possible to lay down hard and fast rules which seek to dictate, in every combination of circumstances, the considerations which will persuade the court that a departure by the acquiescing party from the previously supposed state of law or fact is so unconscionable that a court of equity will interfere. Nor, in my judgment, do the authorities support so inflexible an approach

... the more recent cases indicate, in my judgment, that the application of the *Ramsden v Dyson* ... principle — whether you call it proprietary estoppel, estoppel by acquiescence, or estoppel by encouragement is really immaterial — requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.

Oliver J referred to a number of earlier authorities in support of his approach, including *Ramsden v Dyson* and *Inwards v Baker* [1965] 2 QB 29. In the latter case, the approach was stated very broadly both by Lord Denning MR and by Danckwerts LJ. Lord Denning MR said at p 37:

All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do.

A And Danckwerts LJ said at p 38:

It seems to me that this is one of the cases of an equity created by estoppel, or equitable estoppel, as it is sometimes called, by which the person who has made the expenditure is induced by the expectation of obtaining protection, and equity protects him so that an injustice may not be perpetrated.

- B Similarly, in *ER Ives Inverstment Ltd v High* [1967] 1 All ER 504 Lord Denning MR reiterated the broad principle that the court would not allow an expectation to be defeated 'when it would be inequitable so to do'. The broad approach taken by Oliver J in *Taylor's Fashions Ltd* was adopted by Robert Goff J in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 where his Lordship also emphasized the flexible nature of the estoppel doctrine and rejected rigid over categorization. In the same case, Lord Denning MR said in the Court of Appeal (see [1981] 3 All ER 577) at p 584:

- D The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence; estoppel cannot give rise to a cause of action; estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.
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In *Re Basham (dec'd)* [1986] 1 WLR 1498, Mr Edward Nugee QC — sitting as a High Court judge — accepted the 'broadening process' initiated by Oliver J's consideration of the authorities, and concluded that the principle of proprietary estoppel, at least where the relevant belief is that the claimant is going to be given a right in the future, fell properly to be regarded as giving rise to a species of constructive trust — this being 'the concept employed by a court of equity to prevent a person from relying on his legal rights where it would be unconscionable for him to do so' (at p 1504). According to Mr Edward Nugee QC at p 1504:

- H In cases of proprietary estoppel the factor which gives rise to the equitable obligation is A's alteration of his position on the faith of a similar understanding. A third situation in which the court imposes a constructive trust is where A and B set up house together in a property which is in the name of B alone, and A establishes a common intention between A and B, acted on by A to his (or more usually her) detriment, that A should have a beneficial interest in the property ... Here too, if the two elements of common understanding or intention and detrimental acts on the part of A are established, they give rise to an equitable obligation enforceable against B which is in the nature of a constructive trust. A common theme can be discerned in each of these classes of case; and although different situations may give rise to differences of detail in the manner in which the court will
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give effect to the equity which arises in favour of A, one would expect the general principles applicable in the different situations to be the same unless there is sound reason to the contrary.

The principle of unconscionability has not been universally applied in English case law (see for example, *Matharu v Matharu* (1994) 68 P & CR 93). However, in *Lloyds Bank plc v Carrick* [1996] 4 All ER 630, Morritt LJ referred to *Taylor's Fashions Ltd* and said that it was now clear that to constitute the requisite estoppel it was not necessary to establish all of the five elements or 'probanda'. The broader approach, however, does not mean that if a party chooses to act to his detriment simply in the hope that the other party will give him an interest in land the principle will be applied (see *A-G of Hong Kong v Humphreys Estate (Queen's Garden) Ltd* [1987] 2 All ER 387).

A good illustration of the application of the broader approach is to be found in *Lim Teng Huan v Ang Swee Chuan* [1992] 1 WLR 113, a decision of the Privy Council on appeal from the Court of Appeal of Brunei Darussalam. Here, the plaintiff and defendant jointly purchased land which was transferred into their fathers' names. In 1982, the defendant decided to build a house on the land for himself. At his own expense, preparatory works were carried out and construction commenced. In March 1985, when the house had been partially built, the parties entered into a written agreement whereby the plaintiff acknowledged that the construction was with his consent and agreed to exchange his undivided share in the land for unspecified land expected to be allotted to the defendant by the government. The house was completed and the defendant went into occupation, fencing nearly all of the land. Both fathers then died and the plaintiff, as administrator of his father's estate, brought an action against the defendant claiming, inter alia, a declaration that he was the owner of a one-half undivided share of the land. The Privy Council held that it would be unconscionable for the plaintiff to renege on the assumption that the defendant would have a sole beneficial interest in the house and land on paying compensation to the plaintiff for relinquishing his half-share and accordingly, he was estopped from denying the defendant's title to the whole of the land. In applying *Taylor's Fashions Ltd*, the Privy Council reiterated that, in order to found a proprietary estoppel, it was not essential that the representor should have been guilty of unconscionable conduct in permitting the representee to assume that he could act as he did — it was enough if, in all the circumstances, it was unconscionable for the representor to go back on the assumption which he permitted the representee to make.

In some Commonwealth jurisdictions, there has also been a move away from Fry J's 'probanda' in *Willmott v Barber* (1880) 15 Ch D 96. In the New Zealand case of *Stratoulos v Stratoulos* [1988] 2 NZLR 424, McGechan J said at p 435:

The classical doctrine in recent years has become considerably more flexible. There has been a tendency to move away from strict adherence to the five 'probanda', each being regarded as essential, towards a more general approach based simply upon 'unconscionability'. A trend to that effect had developed in England That liberalizing trend was picked up and applied in New Zealand.

- A In the Australian case of *Beaton v MacDivitt* (1987) 13 NSWLR 162, Mason CJ and Wilson J said:

One may discern in the cases, a common thread which links them together namely, the principle that equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction has 'played such a part in the adoption of the assumption that it would be unfair or unjust if he were left to ignore it' ... Equity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption.

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- C On the evidence to be adduced to found a proprietary estoppel under the concept of unconscionability, Mark Pawlowski in his book entitled *The Doctrine of Proprietary Estoppel* says at p 127:

It has been commented by Westead (1995) Conv 61 at p 63 that the elements of proprietary estoppel have now been condensed into essentially:

- D '... two interlinked requirements distilled from Oliver J's broad test of unconscionability postulated in *Taylor's Fashions*. First, there must be conduct, express or tacit, on the part of the landowners, relating to the acquisition of rights in or over his or her property. Secondly, the claimant of the equity must prove a detrimental alteration of position in reliance on a belief engendered by the landowner's conduct.'

- E In *A-G of Hong Kong v Humphreys Estate (Queen's Garden) Ltd* [1987] 2 All ER 387, the Privy Council, whilst recognizing the trend away from any strict application of rigid criteria towards a more flexible test of unconscionability, nevertheless held that the three elements of assurance, reliance and detriment had to be satisfied. Thus the broader approach is applicable to situations where there is no mistake on the part of anyone but reliance is placed on a common expectation brought about by the conduct and representation of the landowner. It follows that the broad approach is an application of the principle enunciated in *Ramsden v Dyson* (1866) LR 1 HL 129 by Lord Kingsdown and applied in *Inwards v Baker* [1965] 2 QB 29 by Lord Denning MR.

- G In the local case of *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd* [1993] 3 MLJ 352 (at pp 406-407), Edgar Joseph Jr SCJ (now FCJ) disagreed with the defence submission that:

- H ... to establish proprietary estoppel, in cases where a person builds on or improves the land of another, the landowner standing by without asserting his rights while this was going on, it is essential to prove that such a person mistakenly thought that the land was his own when he did those acts, though I accept that in such a case, equity will treat the true owner's conduct as estopping him from subsequently asserting his title to the detriment of such person. I say so because even if such a person builds or improves the land of another knowing he was doing so on land belonging to another, there will still arise an equity in him if the landowner led such person to expect to be allowed to stay there. The case usually cited for this proposition is *Inwards v Baker* [1965] 2 QB 29 at pp 36-37 ...
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His Lordship then added at p 407:

I note that in both *Mok Deng Chee v Yap See Hoi & Ors* [1981] 2 MLJ 321, Salleh Abas FJ (as he then was), speaking for the Federal Court, and Choor Singh J in the Singapore case of *Khew Ah Bah v Hong Ah Mye* [1971] 2 MLJ 86, applied the principle in *Inwards v Baker* although in neither case was there any question of mistake. And, in *Siew Soon Wah v Yong Tong Hong* [1973] 1 MLJ 133, Viscount Dilhorne quoted with approval the following passage in the judgment of Lord Denning in *Inwards v Baker* [1965] 2 QB 29:

'All that is necessary is that the licensee should, at the request or with the encouragement of the landlord have spent the money in the expectation of having been allowed to stay there.'

And at p 408:

Similarly, I am not persuaded that to raise an equity, it is essential that the representator must have knowledge that his property was being improved. The representator's conduct and the subsequent action and belief of the representee may render it unconscionable for the representator to insist on his strict legal rights. I am supported in this by the following passage in the judgment of Oliver J in *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co* [1981] 1 All ER 897 at p 915:

'Furthermore, the more recent cases indicate, in my judgment, that the application of the *Ramsden v Dyson* principle (whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial) requires a very much broader approach which is directed to ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment rather than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.'

Edgar Joseph Jr SCJ's rejection of the prerequisite of a mistaken belief in order to establish a proprietary estoppel in the light of the judgment in *Inwards v Baker* shows that the prevailing law in Malaysia is the basis of the modern trend in England set into motion by *Taylor's Fashions Ltd*. In *Gan Tuck Meng & Ors v Ngan Yin Groundnut Factory Sdn & Anor* [1990] 1 MLJ 227, Peh Swee Chin J (as he then was) referred to the judgment of Fry J in *Willmott v Barber* (1880) 15 Ch D 96 and said at p 233:

In my opinion, Lord Kingsdown's passage and the passage of Fry J viewed presently, do not go as far as what really is the present state of the law of equitable estoppel. They still apply but they seem to overstate the requirements for equitable estoppel to apply. The law, I believe, is what Lord Scarman said in *Crabb v Arun District Council* [1976] 1 Ch 179 at p 192. His Lordship said:

'If the plaintiff has any right, it is an equity arising out of the conduct and relationship of the parties. In such a case I think it is now well settled law that the court having analysed and assessed the conduct and relationship of the parties, has to answer three questions. First, is there an equity established? Secondly, what is the extent of the equity, if one is established? And, thirdly, what is the relief appropriate to satisfy the equity?'

- A The principles underlying the local law of proprietary estoppel were lucidly stated by Salleh Abas FJ (as he then was) in *Mok Deng Chee v Yap See Hoi & Ors* [1981] 2 MLJ 321 at p 323 in the following terms:

The law on tenancy coupled with an equity or simply an equitable estoppel arose from the speech of Lord Kingsdown in *Ramsden v Dyson* (1866) LR 1 HL 129 in which his Lordship referred to the principle as irrevocable licence. This principle was accepted and applied by the Privy Council in *Plimmer v The City of Wellington* (1884) 9 App Cas 699. Finally, it received its judicial refinement in *Inwards v Baker* [1965] 1 All ER 446. In this case Lord Denning MR defined the concept as follows:

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- C ‘It is quite plain from these authorities that, if the owner of land requests another or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with equity ... that the equity arising from the expectation of land does not fail The court can look at the circumstances and see whether there is an equity arising out of the expenditure of money.’
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The principle is also known as equitable estoppel, because the landowner whose conduct has raised an expectation of his tenant of being allowed to stay on and thereby inducing him to spend money in respect of the tenancy is prevented from taking any action contrary to that expectation.

- E In the development of our law this principle was recognized as long ago as 1916 in the case of *MPRL Karuppan Chetty v Suah Thian* (1916) 1 FMSLR 300. It was applied by Chang Min Tat J (as he then was) in *Devi v Francis* [1969] 2 MLJ 169. Finally, it became a settled law as a result of decision of the Federal Court in *Yong Tong Hong v Siew Soon Wah & Ors* [1971] 2 MLJ 105, which decision was subsequently confirmed by the Privy Council ([1973] 1 MLJ 133). Its practical application was demonstrated in a decision of Syed Othman J whose judgment was confirmed by the Federal Court in *Tan Swee Ho Co Ltd v Ali Hussein Bros* [1980] 1 MLJ 89 and in the decision of Abdoolcader J in *Wong Yon Lin v Liew Tham Soon & Ors* [1980] 2 MLJ 99.
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- G The local law reports show that the principle laid down in *Inwards v Baker* has been consistently followed here without being diverted by the ‘probanda’ of Fry J (see for example, *Lee Eng Teh & Ors v Teh Thiang Seong & Anor* [1967] 1 MLJ 43; *Lee Lum Soh v Low Ngah* [1973] 1 MLJ 97; *Ong Heng Hwa Realty Sdn Bhd v Teoh Chai Siok* [1977] 1 MLJ 124; *Paruvathy v Krishnan* [1983] 2 MLJ 121; *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90; *Ganesha Sdn Bhd v Chua Hock Chye* [1996] 5 MLJ 587; *Saadian bte Karim v Ong Ting Chai* [1996] 5 MLJ 646 and *Rosman bin Hj Abdul Rashid v Rosmah Begum bte Bahadur Beg* [1993] 2 MLJ 196). Thus the modern approach in England is the law as it was, and which still is, in force in Malaysia. Equity, being an unruly horse, had perhaps taken a wild run in England in *Willmott v Barber* (1880) 15 Ch D 96 and was harnessed in *Taylor's Fashions Ltd*.
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I shall now briefly deal with the three elements that must be proved in order to establish a proprietary estoppel, namely: (a) assurance; (b) reliance and (c) detriment.

Assurance

The assurance or representation must be clear and unequivocal and intended to be relied upon by the claimant to his detriment (see *Sidney Bolsom Investment Trust Ltd v E Karmios & Co (London) Ltd* [1956] 1 QB 529). A mere expression of opinion, therefore, is not a sufficient representation (see *E & L Berg Homes Ltd v Grey* (1979) 253 EG 473). In the absence of any encouragement or acquiescence on the part of the legal owner, the claimant's expenditure on the land is treated as voluntary (see *Ezekiel v Orakpo* 20 February 1980 (unreported))

The encouragement or acquiescence may take a variety of forms. It may be an active encouragement — that is to say, by words or deeds as in *Inwards v Baker* — or it may be passive where the landowner merely encourages the builder's belief, as where the mortgagee stood silently by while a purchaser, in ignorance of the mortgage, built on the land (see *A-G of Hong Kong v Humphreys Estate (Queen's Garden) Ltd* [1987] 2 All ER 387; *Haslemere Estate Ltd v Baker* [1982] 1 WLR 1109 and *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133). The statement of the second principle can be found in the judgment of Lord Wensleydale in *Ramsden v Dyson* (1866) LR 1 HL 129 at p 168:

If a stranger builds on my land, supposing it to be his own, and I, knowing it to be mine, do not interfere, but leave him to go on, equity considers it to be dishonest in me to remain passive and afterwards to interfere and take the profit. But if a stranger builds knowingly upon my land, there is no principle of equity which prevents me from insisting on having back my land, with all the additional value which the occupier has imprudently added to it.

Basically, the question to be asked is whether there was 'anything done or left to be done' by the legal owner which encouraged a belief in the claimant that he would acquire an entitlement in the owner's land (see *E & L Berg Homes Ltd v Grey* (1979) 253 EG 473). The assurance must give rise to an expectation of: fee simple ownership (see *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; *Pascoe v Turner* [1979] 1 WLR 431 and *Voyce v Voyce* (1991) 62 P & CR 290); equitable entitlement (see *Hussey v Palmer* [1972] 1 WLR 1286 and *Lim Teng Huan v Ang Swee Chuan* [1992] 1 WLR 113); a first option to purchase (see *Stilwell v Simpson* (1983) 133 New LJ 89 and *Wellington City Council v New Zealand Law Society* [1988] 2 NZLR 614); grant of a lease (see *Watson v Goldbrough* (1986) 1 EGLR 265; *Siew Soon Wah v Yong Tong Hong* [1973] 1 MLJ 133 and *Andrews v Colonial Mutual Life Assurance Society Ltd* [1982] 2 NZLR 556); licence to occupy for life (see *Griffiths v Williams* (1978) 248 EG 947; *Inwards v Baker* [1965] 2 QB 29; *Greasley v Cooke* [1980] 1 WLR 1306 and *Maharaj v Chand* [1986] AC 898) and the grant of an incorporeal interest like an easement over the land (see *Crabb v Arun District Council* [1976] Ch 179 and *ER Ives Investment Ltd v High* [1967] 1 All ER 504). As Mark Pawlowski says in his book referred to earlier, it is evident that a claim will not fail simply because the right or interest to be secured has not been precisely or expressly indicated at the time of the assurance (see *Plimmer v The Mayor & Ors* (1884) 9 App Cas 699). It is enough that the representation leads to an expectation that some right is being or will be

A acquired by the claimant. It is not, therefore, a requirement that there be an expectation of some precise legal term. Thus in *Inwards v Baker*, where the son had spent money on building a bungalow on his father's land in the expectation, induced by his father, that he would be allowed to stay there as his home, Lord Denning MR said at p 37:

B ... even though there is no binding contract to grant any particular interest to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money.

It must be noted that there is no requirement that the underlying transaction between the parties should constitute a pre-existing binding relationship.

C In this regard, Robert Goff J said in *Holiday Inns Inc v Broadhead* (1974) 232 EG 951 at p 1087:

... this relief can be granted although the arrangement or understanding between the parties was not sufficiently certain to be enforceable as a contract.

Reliance

D Reliance necessarily involves the belief of the representee in the truth of the representation (see *Lowe v Lombard Bank Ltd* [1960] 1 All ER 611). The requirement of reliance is not strict. It may be presumed or inferred once it has been shown that an assurance was calculated to influence the judgment of a reasonable man (see *Brikom Investments Ltd v Carr* [1979] QB 467).

Detriment

The claimant must establish that he relied on the assurance to his detriment. In *Greasley v Cooke* [1980] 1 WLR 1306, Lord Denning MR accepted that expenditure of money was not a necessary element since it was sufficient '... if the party, to whom the assurance is given, acts on the faith of it — in such circumstances that it would be unjust and inequitable for the party making the assurance to go back on it.' In *ER Ives Investment Ltd v High* [1967] 2 QB 379, Winn LJ stated that the person entitled to an estoppel must show he has '... suffered a past detriment or other change of position.'

G In *Bhimji v Salih* 4 February 1981, CA (unreported) — available on Lexis — Brightman LJ expressed the view that proprietary estoppel could only apply where '... the promisee had in fact acted to his detriment in the sense that ... the promisee has altered his position in a way which would be to his disadvantage if the strict legal position remain unqualified.' In *Watts & Ready v Storey* (1984) 134 NLJ 631, Dunn LJ expressly renounced the suggestion that no detriment was required to raise an equitable estoppel. This is logical as it is the element of detriment which renders it unconscionable for the legal owner to insist on his strict legal rights. In *Stevens v Stevens* 3 March 1989, CA (unreported) — available on Lexis — Slade LJ said:

I Where the court invokes and applies the doctrine of proprietary estoppel, it is, in the exercise of its equitable jurisdiction, acting upon the conscience of the owner who has the paper title to the land because, broadly it considers that, in all the circumstances of the case, it would be against conscience for the owner with the paper title, who has made the relevant representations,

to decline to give effect to the interest which he has led the other party to believe he or she will have. If the other party has suffered no detriment, in other words if he or she has not been prejudiced in any significant way by the representations, it will not ordinarily be against conscience to allow the plaintiff to resile from his promise, which ex hypothesi is not of a contractual nature.

The burden of proving detriment or alteration of position rests throughout on the party setting up the estoppel. It is a question of fact to be decided on the evidence adduced (see *Fung Kai Sun v Chan Fui Hung* [1951] AC 489 and *Inland Revenue Commissioner v Morris* [1958] NZLR 1126). In determining whether detriment has been proved the court may take into consideration any benefit or advantage enjoyed by the claimant during the relevant period of expenditure or occupation. It may result in the claimant not having suffered any detriment at all. In *E & L Berg Homes Ltd v Grey* (1979) 253 EG 473, one of the reasons why the claim based on proprietary estoppel failed was because the claimants had been extremely fortunate to be allowed to occupy the site without any payment of rent or other consideration of any kind for over 26 years. In *Beaton v MacDivitt* (1987) 13 NSWLR 162, it was held that '... the case may be that the claimant has already had a sufficient satisfaction for his expenditure, so may be entitled to no relief ...' and that '... there would be a lot to be said for the proposition that rent and rate free occupation of this land for seven years has already satisfied any equity that the plaintiff may have had.' In *Bostock v Bryant* (1990) 61 P & CR 23, Stuart-Smith LJ said at p 32:

It was to their advantage that they should remain in the house on this very favourable terms and conditions, living rent-free simply on the payment of the outgoings in respect of the gas and electricity bills, and that there really was no detriment to her at all.

In *Cullen v Cullen* (1962) IR 268, the court refused to order a transfer of the legal owner's land since the only act relied on by the claimant to create the estoppel was the putting of £403 into the former's business. As against that, the claimant had been in receipt of the profits of the business and these sums were considerably more than the amount which she had paid. In *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352 Edgar Joseph Jr SCJ (as he then was) said at p 412:

More particularly, having regard to the fact that the plaintiffs and their ancestors have been living on the plot concerned and cultivating the vegetable land for the planting of vegetables and fruit trees on which they had also reared pigs and poultry for commercial purposes, and the substantial sums of money which must have accrued to them and their ancestors by way of profit thereby over a period of several decades, and the further fact that the plaintiffs have enjoyed rent-free occupation for the last decade or so, I consider that the plaintiffs have had 'sufficient satisfaction' for their labour and expenditure on the plot concerned or, in other words, the prejudice suffered by them has been fully satisfied, and so, they are entitled to no relief (see *A-G v Bialol College Oxford* (1774) 9 Mod 407, per Lord Hardwick).

On the burden of proof to establish an equity, Seah SCJ in writing for the Supreme Court in *Tan Khien Toong & Ors v Hoong Bee & Co* [1987] 1 MLJ 387, said at pp 391-392:

- A In my opinion, in order to raise the equitable estoppel against the appellants it was incumbent upon the respondents to show that in 1962 they were induced by the late Tan Kwan (landlord) to pay over the RM9,000 to him under an oral agreement or promise that the respondents would be allowed to remain in the ground floor of the shop premises as long as they liked subject only to the payment of the monthly rent regularly and promptly.
- B The onus of establishing this payment and oral promise rested on the respondents and on the findings of the court below. I had no difficulty in coming to the conclusion that they had failed to discharge it.

On the manner of discharging the burden of proof useful reference may be made to *Cheo Lean How v Fock Fong Looi* [1985] 2 MLJ 440, where Seah SCJ said in the Supreme Court at pp 443-444:

- C On the facts of this case, we have no difficulty in coming to the conclusion that the respondent had failed to discharge the onus of proof. First, it was common ground that it was Chung Yen who erected the dwelling house on the disputed land and not the respondent. Secondly, it was the respondent's father, Loke Seng who purchased the dwelling house from Chung Yen.
- D Thirdly, exh P6 made it very clear that the sale was in respect of the dwelling home only. By so limiting both Chung Yen and Loke Seng knew or ought to know or must be deemed to know that the dwelling house was built on State land and that Too Sun was the holder of the TOL. Fourthly, the respondent had not adduced any evidence how the dwelling house was put up by Chung Yen on the disputed land. All that the respondent could produce at the trial appear to be that the dwelling house was erected with the knowledge of and without any objection from Too Sun, and that after the execution of exh P6 Loke Seng went into occupation of the dwelling house and this fact was unknown to Too Sun. After the death of Loke Seng, the respondent remained to occupy the dwelling house without any interruption from Too Sun. The respondent continued to occupy the dwelling house even after qualified title was issued to Too Sun in 1974. Attempts were made to prove that the respondent paid his share of the land premium and other outgoings when the qualified title was issued to Too Sun in 1974 but this was rejected by the trial magistrate and there was no cross-appeal against this finding. *In short, the respondent had failed to establish that after the qualified title was registered in the name of Too Sun, he had expended money in the dwelling house at the request of or with the encouragement of Too Sun in the expectation that he would be allowed to remain there.* (Emphasis added.)
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- F
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I now refer to the Federal Court case of *Mok Deng Chee v Yap See Hoi & Ors* [1981] 2 MLJ 321, where Salleh Abas FJ (as he then was) in considering whether there was an equitable estoppel on the facts of the case said at p 323:

- H ... The house was built by Hong Kong who rented the ground from the previous owner of the land. In the absence of any contrary evidence, we must assume that the house must have been built with encouragement and approval or at least without any objection by the previous landowner.
- I In my opinion, and with the utmost respect, the assumption of the existence of the required evidence in *Mok Deng Chee* is in clear conflict with ss 101 and 103 of the Evidence Act 1950 and the patent language employed in *Tan Khien Toong* and applied in *Cheo Lean How* on the manner of establishing an equity. At the highest, the judgment is peculiar to its own

facts. It is settled law that where there are two conflicting decisions of a superior court an inferior court is free to act on its own opinion as to which is the more convincing (see *Baker v R* [1975] AC 774). In the circumstances, and again with the most utmost respect, I feel constrained to be bound by *Tan Khien Toong* as to the manner of establishing an equitable estoppel.

THE FINDING

With regard to the case for the first defendant, I reproduce the material parts of his affidavit which read as follows:

Saya adalah defendan pertama dalam Saman Pemula No 24-132-95 dan segala fakta-fakta yang dinyatakan di sini adalah benar dalam pengetahuan saya sendiri.

Bahawa saya merupakan seorang kawan lama dengan Puan Lim Low Tiew (P) dan suami beliau dan atas persahabatan yang lama ini, saya telah dibenarkan oleh Puan Lim Low Tiew (P) menduduki sebahagian daripada Lot 184 Interim Register, Mukim Batu Berendam, Melaka serta membinakan satu rumah kediaman papan setakat tahun 1957.

Saya sertakan enam keping gambar disini dan ditandakan sebagai eks CH-1 gambar-gambar rumah saya yang terletak atas Lot 184, Mukim Batu Berendam, Melaka pada masa sekarang.

Bahawa anak pertama saya yang bernama Chai Fong Kiow telah pun dilahirkan di rumah ini pada 25 Oktober 1957 dan anak bongsu saya juga dilahirkan di tempat yang sama. Salinan surat beranak anak saya masing-masing dilampirkan di sini dan ditandakan sebagai eks CH-2.

Bahawa saya juga telah belanja wang untuk membina rumah itu dan menanam pokok-pokok limau 300 batang dan jambu lebih kurang 200 batang untuk memelihara keluarga saya. Saya juga tidak tahu kerja yang lain melainkan kerja saya sebagai seorang pekebun dan usaha saya menjaga tanaman dan menjualkan buah-buahan daripada kebun saya merupakan satu punca pendapatan satu-satunya (only source of income). Saya lampirkan gambar-gambar yang menunjuk baris pokok buah-buahan yang ditanam di atas Lot 184, Mukim Batu Berendam, Melaka.

Bahawa saya tidak bantah seolah-olahnya permohonan pihak plaintif sekiranya pihak Mahkamah yang mulia ini ambil kira masalah yang akan timbul dengan kehilangan tempat kediaman sekeluarga saya serta kehilangan kekal (permanent loss) satu-satunya punca pendapatan saya.

Bahawa dengan rendah diri saya memohon agar ekuiti pihak kami dapat pertimbangan sewajarnya daripada pihak mahkamah yang mulia ini dan pihak plaintif diperintahkan membayar defendan pertama satu pampasan yang munasabah dan suaimanfaat.

Dengan ini saya memohon perintah yang difikir perlu demi kepentingan keadilan kes ini.

There was evidence to show that LLT had allowed the first defendant to occupy a portion of Lot 184 and to build a house on it in 1957. He had expended money in putting up the house and had planted fruit trees on the portion of land occupied by him. The fruit trees that he had planted constituted the sole source of his income. Two of his children were born in that house. I must observe that cases of this nature must be read in the light of the facts of a particular case (see *Electrolux Ltd v Electrix Ltd* (1954) 71 RPC 23). No direct evidence was adduced by the first defendant on the

A interest that he believed he would have had on the portion of the lands
occupied by him as LLT only gave him permission to occupy a portion of
the lands and build a house there. The representation by LLT was therefore
not clear and unequivocal. Even though there was no evidence of an
expectation of a precise legal term, the court may look at the circumstances
and see whether there was an equity arising out of the expenditure of
B money (see *Inwards v Baker* [1965] 2 QB 29). In this type of case, the
extent of the expenditure and the nature of the construction may give an
indication of the nature of the interest (see *Ooi Ai Seng v Chan Lin Lam*
[1973] 2 MLJ 20).

C No evidence was led by the first defendant on the expenditure
incurred by him in order to facilitate an inference that he believed that he
would be given an interest over the portion of lands occupied by him. The
fact that he occupied his portion of the lands for an uninterrupted period
of about 40 years was not sufficient on its own to found an equity in his
favour on the facts of this case. In *Rogers v Eller* 20 May 1966 (CA)
D (unreported), available on Lexis, the claimant argued that the requisite
encouragement on the part of the legal owner could be inferred from
certain circumstances: firstly, permitting his sister to reside in the subject
property for about 40 years; secondly, allowing her (and her former
husband) to maintain it; thirdly, allowing them to improve it and to incur
substantial expenditure in so doing; fourthly, permitting her to care for
E him and to look after him (particularly, at a period during which he was ill
for some six months); and fifthly, failing to take any action to recover
possession of the house. In particular, stress was placed on the long period
of time during which the claimant had been allowed to occupy the property
without any express indication, on the part of the plaintiff, that she would
F ever be turned out. The Court of Appeal, however, rejected these five
factors, taken individually or cumulatively, as being sufficient to raise the
inference that the claimant could remain in the premises for as long as she
wished. Slade LJ, giving the leading judgment of the court, concluded that
these five factors were perfectly consistent with an arrangement between
the parties that the claimant should be allowed to live rent-free in the
G property without a definite time limit but only so long as the plaintiff so
desired.

However, in certain circumstances, uninterrupted occupation may
lead rise to an inference of the existence of an equity. In the Canadian case
of *R v Smith* (1981) 113 DLR (3d) 522, the Crown was held, by virtue of
H its long inaction with knowledge that the subject land was being occupied
by non-Indians, to have stood by and acquiesced in various improvements
made by the respondent and his predecessor in occupation. The Crown,
through both the provincial and federal government, knew of the occupation
of the land by non-Indians from 1838 onwards but never took steps to
regularize the position. In view of the Crown's passive conduct, it was held
I unconscionable for it to recover the land from the respondent without
compensation for the improvements made. That of course is not the
position in the case of the first defendant. Thus there is no evidence to
reach any conclusion that LLT had led the first defendant into the belief
or expectation that upon him expending money in building the house he

could remain there for as long as he liked or for a considerable length of time. This was the ground on which Ajaib Singh J (as he then was) held that there was insufficient evidence to support an equity in *Charles Grenier Sdn Bhd v Thien Hee & Sons Sdn Bhd* [1980] 1 MLJ 184. In *Ooi Ai Seng v Chan Lin Lam* [1973] 2 MLJ 20, the Federal Court stressed the need for such evidence. Accordingly, I hold that the first defendant has failed to establish that he had an equity over the portion of lands occupied by him. In any event, the fact that the first defendant had been in occupation on his portion of the land rent-free, and has been using it as a source of income for over 40 years is a sufficient satisfaction for his expenditure and, accordingly, he cannot be said to have suffered any detriment to found an equity in his favour. Even if it can be argued that the first defendant had a valid equity he, having been only allowed to occupy his portion of the land and build a house thereon, had only an agreement for a lease which is capable of subsisting for only a maximum of 30 years (see *Siew Soon Wah & Ors v Yong Tong Hong* [1973] 1 MLJ 133. In the circumstances, the equity, having commenced in 1957, would have been satisfied in 1987 and its termination is in accordance with law (see *Saadian bte Karim v Ong Ting Chai* [1996] 5 MLJ 646 and *Ganesha Sdn Bhd v Chua Hock Chye* [1996] 5 MLJ 587). In any event, as I said in an earlier part of the judgment, the registered title of the plaintiff will defeat the prior equitable interest of the first defendant if it can be argued that he had such an interest.

EQUITABLE DOCTRINE OF NOTICE

Notwithstanding what I have said thus far, I shall now consider the defence's contention that the plaintiff is bound by the equities of all the defendants as he had notice of their occupation. For this purpose, I shall assume that the first defendant also had an equity. In my opinion, the plaintiff's right cannot be defeated by the equitable doctrine of notice which is part of English land law. Lord Diplock, in delivering the advice of the Privy Council in *T Damodaran v Choe Kuan Him* [1979] 2 MLJ 267, said that by s 6 of the Civil Law Ordinance 1956:

The law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein, is expressly excluded from the general reception of English common law and rules of equity as part of the law of Malaysia. His Lordship added at p 269:

... The National Land Code applies to Malaysia the Torrens system of registration of title to land. The whole purpose of the system is to get away from the complicated system of rules which in England regulate dealings in land, particularly those relating to such matters as notice of encumbrances and trusts. As was said by the Court of Appeal of New Zealand in relation to the corresponding New Zealand legislation, the Land Transfer Act 1885:

'The cardinal principle of the statute is that the register is everything, and that, except in case of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the

- A registration of which is not expressly authorized by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest': *Fels v Knowles* (1906) 26 NZLR 604 at p 620.'

The Federal Court in *Teh Bee v Maruthamuthu* [1977] 2 MLJ 7, in saying at p 12 that 'under the Torrens system the register is everything', also referred to *Creelman & Anor v Hudson Bay Insurance Co* [1920] AC 194 where Lord Buckmaster said at p 197:

- B Their Lordships are unable to accede to either of these propositions. In their opinion the certificate of title referred to in s 22 of the Land Registry Act is a certificate which, while it remains unaltered or unchallenged upon the register, is one which every purchaser is bound to accept. And to enable an investigation to take place as to the right of the person to appear upon the register when he holds the certificate which is the evidence of his title, would be to defeat the very purpose and object of the statute of registration.
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- D In *United Malayan Banking Corp Bhd & Anor v Pemungut Hasil Tanah, Kota Tinggi* [1984] 2 MLJ 87, Lord Keith of Kinkel said at p 91:

The National Land Code is a complete and comprehensive code of law governing the tenure of land in Malaysia and the incidents of it, as well as other important matters affecting land there, and there is no room for the importation of any rules of English law in that field except in so far as the Code itself may expressly provide for this.

- E
- F The doctrines of English equity do not apply with equal force to a system of registration of title to land contained in a codifying law such as the NLC 1965 (see *Ong Chat Pang v Valliappa Chettiar* [1971] 1 MLJ 224). This is the natural result of s 340 and the limited exceptions contained therein and accords with the judgment of the Supreme Court in *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449, where it was held that upon the registration of the transfer of any land to the purchaser he obtains a right in rem and that the express provisions of the NLC 1965 will apply to the exclusion of equitable principles. Section 340 of the NLC 1965 expressly provides that the title of a person registered as proprietor of any land shall be indefeasible.
- G Interests in land, short of proprietorship, which are capable of being registered are leases, charges and easements. If registered they would amount to encumbrances within the meaning of a covenant against encumbrances; but unless registered they do not derogate from the unencumbered title of the registered proprietor of the land. Claims to be
- H entitled to the proprietorship of land or a registrable interest in land, whether or not they are the subject of litigation, are not registrable as encumbrances on a registered title. Instead they are protected by the system of private caveats which, while leaving the registered title unqualified and intact, have the effect of preventing any dealing with it by the registered
- I proprietor so long as the caveat remains in force; that is, until it is removed from the register. Lord Diplock, in delivering the advice of the Privy Council in *Eng Mee Yong & Ors v Letchumanan* [1970] 2 MLJ 212, said that the system of private caveats under the NLC 1965 is substituted for the equitable doctrine of notice in English land law. In *Osmanoski v Rose*

[1974] VR 523, it was held that where the registrar is obliged to enter particulars of a caveat (as in the case of the NLC 1965), the legislation contemplates that a purpose of lodging a caveat is to give notice of the interest. A person who searches the register book and discovers a caveat or otherwise becomes aware of the caveat, for example, by lodging a caveat for registration and discovering that it is blocked by a caveat will be regarded as having actual notice of the interest claimed by the caveator (see *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546). A caveat is constructive notice of the interest claimed to a person who ought to have searched the title (see *Drulroad Pty Ltd v Gibson* (1992) NSW Conv R 55-637). That the equitable doctrine of notice is incompatible with the NLC 1965 has been enunciated in cases such as *Tai Lee Finance Co Sdn Bhd v Official Assignee & Ors* [1983] 1 MLJ 81 where the Federal Court followed the earlier Federal Court judgment in *Doshi v Yeoh Tiong Lay* [1975] 1 MLJ 85 where it was held that:

... the doctrine of constructive notice is inapplicable to system of registration in relation to transactions where priority and notice are governed by priority in or the fact of registration and the court will not readily apply the doctrine where the effect would be to invalidate a transaction in relation to the sale of land.

This view was adopted by the Federal Court in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12. Seah FJ in delivering the judgment of the Federal Court in *Yong Wee Ming v Chin Thian Guan* [1984] 1 MLJ 236 said at p 237:

In other words, the principle of indefeasibility of title conferred by registration under the Torrens system cannot be defeated by setting up the fiction of a trust or by applying the principles of what has been called constructive or equitable notice.

In *Than Kok Leong v Low Kim Hai* [1983] 1 MLJ 187, Mohd Dzaidin JC (as he then was) said that the doctrine of equitable notice has no application in land dealings in Malaysia (see also *Ong Tin & Anor v Seremban Motor Garage* [1917] 1 FMSLR 308). In *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770, Gopal Sri Ram JCA expressed doubts as to whether the English principle of constructive notice, which is part and parcel of their version of the doctrine, applies to contracts for the sale of land in this country in the face of the system for the protection of interests by the entry of caveats. It is stated in 16 *Halsbury's Laws* (4th Ed) at para 1327, that:

The doctrine of constructive notice is inapplicable, as a rule, to systems of registration in relation to transactions where priority and notice are governed by priority in or the fact of registration; thus a subsequent purchaser in incumbrances who gains priority by registering first does not lose it by actual or constructive notice, but only by fraud.

To sum up the position, I refer to *The Torrens System in Malaya* by SK Das where it is stated at p 193:

Express notice assumes great importance where circumstances inevitably point to the conclusion that the subsequent purchaser intended to defraud the prior unregistered purchaser of known existing rights. *Culpa lata*, on

- A which the doctrine of constructive notice is based, has no application under the Torrens system.

This is inevitable as the acceptance of the equitable doctrines of notice will rock the very foundation of the NLC 1965 with its s 340 which provides indefeasibility of title and s 323 which deals with the caveat system. The inapplicability of this doctrine is further made clear by s 340(3) which, while protecting a '... purchaser in good faith and for valuable consideration ...', does not incorporate the equitable phrase '... without notice ...' which is the substratum of the English doctrine of notice. I must emphasize that the exclusion of the equitable doctrine of notice in any system of registration of land is not unusual. This observation flows from the pen of Lord Wilberforce in *Frazer v Walker* [1967] 1 All ER 649 at p 653:

In all systems of registration of land it is usual and necessary to modify and indeed largely to negate the normal rules as to notice, constructive notice, or inquiry as to matters possibly affecting the title of the owner of the land.

- D The result is that the reliance of the defence on the English rules of notice must fail. This does not, however, mean that actual notice under the English doctrines is totally irrelevant in our system of land dealing. It may be used to indicate the presence of fraud within the meaning of s 340(2)(a) as was the case in *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491. Even if it can be argued that the English rules of notice are indeed applicable, the contention of all the defendants that the plaintiff ought to have known of their presence is insufficient to establish the existence of their respective equities. Knowledge of their presence on the lands does not go to establish that their occupation is coupled with an equity. In order to be bound the plaintiff must be shown to have been aware of the equity which was not done. Support for this proposition comes from *Kalimuthu v S Kandiah* [1976] 2 MLJ 217, where Gill CJ (Malaya) in writing for the Federal Court, said at p 221:

Assuming that the respondent's father acquired some sort of equity under that agreement, the appellant as a purchaser *without notice of that equity* is not bound by it. (Emphasis added.)

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MANNER OF PROTECTING AN EQUITY

As the equitable doctrine of notice is incompatible with the NLC 1965, it now becomes necessary to consider the manner in which all the defendants could have protected their interests on the assumption that they are all lawful. Under the NLC 1965, registration of an instrument of dealing is effected by the making of a memorial of the dealing on the register document of title to the land under the hand and seal of the registrar or land administrator concerned (see *Mohd bin Buyong v Pemungut Hasil Tanah, Gombak & Ors* [1982] 2 MLJ 53). However, the only interests capable of being registered are titles, leases (including subleases) for a term exceeding three years, charges on the land and easements over the land. Interests in land that are unregistrable fall into three categories: that is to say, tenancies for a term of less than three years; liens created by a deposit of instruments of title as security for a loan; and beneficial interests

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under a trust affecting the land. Short term tenancies are protected by endorsement on the register document of title to the land. Protection for all other kinds of interests is provided by entering a caveat in the register on the document of title to the land. The caveat under the Torrens system has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the court of the caveator's claim to title to the land, in an ordinary action brought by the caveator against the caveatee for that purpose (see *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212). In *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224, it was held that it is much more effective than an injunction against the proprietor for it is effective both against him and the land. In order to lodge a caveat, the caveator must have a caveatable interest (see *Goo Hee Sing v Will Raja & Anor* [1993] 3 MLJ 610). The law relating to the interests that are capable of being caveated was neatly summarized by Gopal Sri Ram JCA in his familiar lucid style in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719 at pp 755–756 in the following terse terms:

CAVEATABLE INTEREST

To paraphrase s 323(1)(a) of the NLC 1965, a private caveat may be entered at the instance of any person or body who claims either:

- (1) the title to land; or
- (2) any registrable interest in land.

The parameters of caveatability under s 323(1)(a) are therefore circumscribed by these words: 'title' and 'registrable interest'. It is only one who makes a claim to either of these in land may enter a private caveat.

Although the words 'title' and 'registrable interest' are not defined by the NLC 1965, their meaning may be gathered from the scheme of the NLC 1965 and from the indefeasibility provision, namely, s 340(1). The latter points to a bifurcation between title (the equivalent of the English fee simple) and registrable interests, that is, leases, charges and easements.

In my judgment, the position that obtains under the NLC 1965, so far as is relevant to the present appeal, may be stated in the following way. The NLC 1965 creates three categories of interests in land. They are as follows.

Category 1: Registrable interests in land

Only certain interests are capable of registration. Within this are two sub-categories, namely:

- (a) Registered title. This may be in perpetuity or for a term of years. It pertains to ownership of land. The 'owner' is termed by the NLC 1965 as a 'registered proprietor'; and
- (b) Registrable interests falling short of ownership. These are leases, charges and easements.

Registration carries with it a bundle of rights, which includes, subject to any restriction imposed by the alienating authority, the right to effect a transfer of the particular registered interest. The NLC 1965, in s 340(1), confers indefeasibility upon registered title and interests in land. Section 340(2) creates exceptions which, if established, may operate to defeat such registered title or interest.

- A *Category 2: Interests that are incapable of registration*
These include tenancies exempt from registration, which may be protected by means of an endorsement upon the register document of title.
- Category 3: Caveatable interest*
- B These are unregistered interests which are capable of protection by the entry of a private caveat. In the context of s 323(1)(a), it is only a claim to the interests falling under category (a) and (b) above that may be protected by the entry of a private caveat. Cases falling under category (2) are not caveatable interests. A private caveat cannot, therefore, be entered by one who claims such an interest. Protection for such interests must be secured in the manner prescribed by the NLC 1965.
- C The entry of a caveat is a unilateral act which serves the following objects:
- (a) It serves as a notice to the world at large that the caveator has a claim to an alleged interest in the land (see *United Malayan Banking Corp Bhd v Goh Tuan Laye & Ors* [1976] 1 MLJ 169; *Ling Tee Huah Credit & Leasing Sdn Bhd & Ors v Lii Tat Credit Mortgage Sdn Bhd & Anor* [1990] 1 MLJ 58; *Hasan bin Sui & Anor v Ban Ling Sdn Bhd & Ors* [1992] 3 CLJ 1428; *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224 and *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770).
- D
- (b) It serves to prohibit subsequent dealings with the land or an interest therein (see *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224; *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53; *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44 and *Ismail bin Mohd v Hj Yahya & Ors* [1988] 2 MLJ 185).
- E
- (c) It serves to preserve the status quo of the contending parties pending the resolution by the court of their dispute over the land or interest in question (see *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224; *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44 and *Damodaran v Vasudeva* [1974] 1 MLJ 128).
- F
- G However, it must be noted that the entry of a caveat does not enhance the caveator's interest or claim to an interest in the land (see *Ng Kheng Yeow v Chiah Ah Foo & Ors* [1987] 2 MLJ 330); nor does it create a legal interest in the land (see *Chua Hee Hung v QBE Supreme Insurance Bhd* [1990] MLJ 480).
- H Under the NLC 1965, there are four different kinds of caveats. They are: the registrar's caveat; the private caveat; the lienholder's caveat and the trust caveat. For the purposes of the case at bar, what is of relevance is the private caveat. Its entry is governed by s 323 which reads as follows:
- (1) The persons and bodies at whose instance a private caveat may be entered are:
- I
- (a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;
- (b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

- (c) the guardian or next friend of any minor claiming to be entitled as mentioned in para (b). A
- (2) Any such person or body wishing to apply for the entry of such a caveat shall do so in Form 19B and such application shall be attested in accordance with the provisions of s 211 and shall state therein the nature of the claim on which his application is based, and whether the caveat is to be expressed to bind the land itself or a particular interest only. B
- (3) Any application under this section shall be accompanied by the prescribed fee and, so far as it sets out the claim giving rise thereto, be verified by a statutory declaration by the applicant or his advocate and solicitor. C

Section 322(2) provides that a private caveat will prohibit, for so long as it continues in force, the registration, endorsement or entry on the register document of title thereto of:

- (a) any instrument of dealing executed by or on behalf of the proprietor thereof, and any certificate of sale relating thereto; D
- (b) any claim to the benefit of any tenancy exempt from registration granted by the said proprietor; and
- (c) any lienholder's caveat in respect thereof.

Therefore, when a private caveat has been entered against a piece of land, the caveatee will not be able to effect a transfer, lease, charge, easement or lien in respect of the land (see *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224). Similarly, a successful bidder who has bought a piece of land at a public auction will not be able to register any certificate of sale obtained from the court consequent upon that sale because of the existence of the caveat. E

The issue that now requires consideration is whether the equities of the first to fifth defendants are capable of being caveated as they are interests which cannot be registered. The right of the sixth defendant is an interest registrable as an easement. F

The language employed in s 323(1)(a), which has been given a wide and liberal interpretation by the courts, does not confine its application to a person who has an immediate registrable interest to a title or interest only but also extends to a person who has a claim to '... any right to such title or interest'. These words which include a mere right to a registrable interest (see *J Raju v Kwong Yik Bank Bhd* [1994] 2 MLJ 408) refer to interests which are not capable in their present form of being caveated by causing an entry to be made in the register. In this regard, Suffian LP said in *Mahadevan & Anor v Patel* [1975] 2 MLJ 207 at p 208 that: G

... the principle is that it is not only a person who has a right to a registrable interest in land that may enter a caveat against the land, but it is any person claiming title to, or any registrable interest in, any alienated land or even claiming only a right to such title or registrable interest, who may enter a caveat ... H

Lord Diplock, in delivering his advice in *T Damodaran v Choe Kuan Him* [1979] 2 MLJ 267, said at p 269: I

- A Claims to be entitled to the proprietorship of land or a registrable interest in land whether or not they are the subject of litigation, are not registrable as encumbrances on a registered title. Instead, they are protected by the system of private caveats which, while leaving the registered title unqualified and intact, have the effect of preventing any dealing with it by the registered proprietor so long as the caveat remains in force; that is, until it is removed from the register.
- B

I also refer to the judgment of the Federal Court in *Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53 where Gill CJ (Malaya) said at p 54:

- C As regards the first question, s 323(1)(a) of the National Land Code 1965 provides that a private caveat may be entered at the instance of 'any person, or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest'. It would seem clear that the respondent cannot claim title to or any registrable interest in the property in question merely on the strength of the sale agreement which is a non-statutory and non-registrable instrument, but it cannot be denied that he has a right under that agreement to such title or interest by bringing an action for specific performance of the agreement, which in fact he has already done.
- D

And at p 56:

- E A purchaser of land under an agreement cannot obviously have any registrable interest in land. But he had a right to the land or interest in land against the vendor personally which according to Thomson J (as he then was) in *Bachan Singh v Mahinder Kaur* [1956] MLJ 97 is not good against the world as a whole. It will be good against the world as a whole if the vendor executes a legal transfer, that is to say, a transfer executed in the manner required by s 215 of the NLC 1965 and the transfer is registered in the Land Office. This is because on the registration of the transfer, the purchaser becomes vested with the real legal right to or interest in land. In the case of
- F a vendor who refuses to execute such a transfer the purchaser will have to sue him for specific performance which, if granted, would result in the vendor being compelled by the court to execute the transfer. While waiting for specific performance, the purchaser must be able to do something to prevent the vendor from disposing of the land to another buyer or purchaser. He may ask the court for an injunction or he may avail himself of the protection given by the NLC 1965. The latter, I think, is comparatively an easier way of protecting his right or interest. If he enters a caveat that is enough evidence to show that he is 'claiming a registrable interest in land'.
- G

On the principle underlying the caveat system, Buhagiar J said in *Chin Cheng Hong v Hameed & Ors* [1954] MLJ 169 at p 170:

- H ... This agreement is a non-statutory and non-registrable instrument; such instruments do not create an estate or interest, legal or equitable, in the land but create a contractual right, a personal right of action; it passes no actual interest in the land that can be called an equitable estate in the ordinary sense, but an equitable interest of a contractual nature under the instrument consisting of a right to be registered as the owner of the interest purported to be conferred by the instrument (vide *Hogg's Registration of Titles to Land* p 116). As Lord Dunedin stated in *Hj Abdul Rahman v Mohd Hassan* [1971] AC 209:
- I

'The agreement is valueless as a transfer or burdening instrument but it is good as a contract.'

This contractual right may be sufficient to give a person an 'interest' in the land for the purposes of protection by restrictive entry in the register; the claim to an interest in land arising out of a contract is sufficient to make it a caveatable interest and to support a caveat (*Re Registration of Caveat* (1908) Innes 114). The whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests and of interests that have not yet become actual interests in land, but a caveat, being in the nature of a statutory injunction, does not in itself make a claim or right either better or worse.

It is important to note that as stated in *Chin Cheng Hong*, the caveat system exists for the protection of alleged as well as proved interests. Thus in *RAP Nathan v Hj Abdul Rahman bin Hj Yusof & Ors* [1980] 1 MLJ 249, Syed Agil Barakbah J (as he then was) said at p 251:

Now, the whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests and of interests that have not yet become actual interests in land.

On the primary test for a caveatable interest, SK Das in his book entitled *The Torrens System in Malaya* says at p 324:

The primary test for a caveatable interest may be put on an alternative basis: is the right of the person lodging a caveat capable: (i) of specific performance or (ii) of being protected by an interim injunction? The close analogy between injunctions and caveats and the peculiar applicability of the remedy by injunction in the case of land under the Torrens system suggests that the true principle, which should govern the question whether an interest be caveatable or not, is that a caveat may be entered under circumstances which would justify an injunction being granted by the courts; at the same time it must be remembered that given the caveator's interest a caveat may be entered as a matter of right under circumstances which might not call for the immediate intervention in the courts. Richmond J said to the caveator's counsel in *Re Kauri Timber Co* 'You have not *jus in re*. The question is whether, because you might have an injunction against a sale you may therefore lodge a caveat'.

This test was adopted by the Federal Court in *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224. The recognition of equity within the four walls of the NLC 1965 is provided by s 206(3), which states that the provisions of the NLC 1965 requiring dealings to be effected in the statutorily prescribed manner shall 'not affect the contractual operation of any transaction relating to alienated land or any interest therein'. This is significant as the foundation of equitable estoppel is either a contract or the existence of some fact which the legal owner is estopped from denying (see *Canadian Pacific Railway Co v R* [1931] AC 414). In *Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1993] 1 MLJ 443, Edgar Joseph Jr J (as he then was) expressed the view that s 206(3) provides statutory authority for the liberal application of equity whenever there is a basis for that. Accordingly, in appropriate circumstances, the subsection may be relied upon to hold that an equitable interest, which would have been recognized under the NLC 1965 had it been in a statutory form, has been created by the particular agreement in question such that it confers a right in equity to have the agreement specifically enforced by the grant of the appropriate

- A legal interest in lieu thereof. In this regard it must be noted that the doctrine of proprietary estoppel may be used not only as a 'shield' in defence of an action by the legal owner but also as a 'sword' capable of grounding an independent cause of action (see *Pascoe v Turner* [1979] 1 WLR 431 and *Crabb v Arun District Council* [1976] Ch 179). It is therefore capable of specific performance.

B As Judith Sihombing says in her book entitled *National Land Code — A Commentary* (1st Ed) at p 571:

C Strict Torrens systems accept that the caveat can be used only by those who hold a registrable interest, ie an unregistered interest which is capable of immediate registration. The caveat gives, in general law terms actual notice of this registrable interest and it is the only method of giving notice. The caveat does not act to validate this interest but merely freezes the register to enable the caveator to pursue his claim to be entitled to register. Of course, if the caveat can be used only by the holder of a registrable interest, the need for the caveator to pursue his claim for registration is rather illusory for he holds the necessary documents, viz an instrument in statutory form and the issue document of title, to obtain registration. Whether he obtained them fraudulently or not is another matter.

D Some Torrens schemes allow the caveat to be used not only by the holder of the registrable instrument but also by those who have unregistered unregistrable interests. In general law terms this means an equitable interest or an equity.

E In *Butler v Fairclough* (1917) 23 CLR 78, Griffiths CJ in considering whether equitable estates and rights are caveatable said at p 79:

F It must now be taken to be well settled that under the Australian system of registration of titles to land the courts will recognize equitable estates and rights except so far as they are precluded from doing so by the statutes. This recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings.

G The above passage was approved by the Privy Council in *Abigail v Lapin & Anor* [1934] AC 491, where Lord Wright said that a caveat may be lodged with the registrar by any person claiming under any unregistered instrument. In the case of *Re Registration of a Caveat* (1908) Innes 114, it was held that where a proprietor of land who had taken a loan from a moneylender gave an oral promise to charge the land by way of security, the promisor could lodge a caveat to protect what was described as a 'caveatable interest' which he had acquired in the land by reason of his promise. Lamin J (as he then was) referred to this case in *Standard Chartered Bank v Yap Sing Yoke & Ors* [1989] 2 MLJ 49 and said that a caveatable interest arises when a person has a claim over land whether in the nature of a legal or an equitable interest (see also *Liew Siew Yin & Anor v Lee Pak Yin & Anor* [1940] MLJ 135). A caveatable interest arises under an agreement to grant a lease (see *Re Thomson and Chipps, ex p Findlay* (1886) 5 NZLR 52; *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1976) 9 ALR 39; *Leonard v James Hays Studio Pty Ltd* (1982) NSW Conv R 55-085) and *Woo Yok Wan v Loo Pek Chee* [1975] 1 MLJ 156). Although a mere licence is not caveatable, it becomes eligible to be so when it is coupled with the grant of a proprietary interest, in which case the proprietary

interest itself confers a caveatable interest (see *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605; *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466 and *Willmatt v Ilmenite Pty Ltd* (1993) ACL Rep 170 WA 3).

The authorities that I have adverted to make it manifestly patent that a caveatable interest arises when a person has a claim over land and the claim is capable of enforcement by specific performance. It exists for the protection of alleged as well as proved interests and of interests that have not yet become actual interests in land. Such a claim amounts to a right to a title or interest within the meaning of s 323(1)(a) of the NLC 1965. An equity as in the case before me relates to an alleged interest over land and is capable of enforcement by specific performance (see *Siew Soon Wah & Ors v Yong Tong Hong* [1973] 1 MLJ 133). As equity treats it as an agreement for a lease it is on the same footing as a lease and may therefore be caveated (see *Pok Kew Chai v Yeoh Thian Seng & Anor* [1975] 1 MLJ 220). In this regard, Gopal Sri Ram JCA said in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng* [1995] 1 MLJ 719 at p 746:

Equity looks on that as done which ought to be done: *Walsh v Lonsdale* (1882) 21 Ch D 9. In accordance with this maxim, equity treats an agreement to grant a lease on the same footing as a lease (which is a registrable interest under the NLC 1965). Specific performance of the agreement may therefore be ordered and the lessor directed to execute a formal lease in a registrable form. Alternatively, a declaration in suitable terms may be granted: *Siew Soon Wah & Ors v Yong Tong Hong* [1973] 1 MLJ 133. The right of a lessee in these circumstances may be protected by the entry of a caveat pending the trial of his action for specific relief or, to put it in slightly different parlance, the lessee has a caveatable interest: *Woo Yok Wan v Loo Pek Chee* [1975] 1 MLJ 156.

And at p 763:

But I am not to be taken as saying that the doctrine of proprietary estoppel, or more appropriately estoppel by representation, can never be utilized to support a caveatable interests.

It has been held that a proprietary estoppel can also be a constructive trust (see *Lloyds Bank plc v Rosset* [1990] 1 All ER 1111; *Lloyds Bank plc v Carrick* [1996] 4 All ER 630 and *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352) and is therefore caveatable under s 323(1)(b). In *United Malayan Banking Corp Bhd v Development & Commercial Bank Bhd* [1983] 1 MLJ 165, Wan Suleimen FJ said at p 168:

In *Inter-Continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145, this court held that a right in equity to a registrable interest in land is sufficient to confer on the possessor of such right a caveatable interest under s 323(1)(a) and 323(1)(b) of the NLC 1965. (Emphasis added.)

As the equities enjoyed by the first to fifth defendants were caveatable, they ought to have caveated them in order to protect their interests. The sixth defendant ought to have registered his right as an easement. Failure by them to do so means that a subsequent purchaser will get a clean title. In *Zeno Ltd v Prefabricated Construction Co (Malaya) Ltd & Anor* [1967]

- A 2 MLJ 104, Raja Azlan Shah J (as His Highness then was) referred to *Butler v Fairclough* (1917) 23 CLR 78, where it was held that the failure to file a caveat constitutes negligence so as to defeat the prior equity because such a failure enables the registered proprietor to hold 'his certificate of title in his pocket' and to 'hawk the certificate around the town' and to obtain advances of money on the face of the 'clean certificate'. Accordingly,
- B the plaintiff will get a clean title even if the interests of all the defendants can be said to be lawful.

THE APPLICABILITY OF THE ENGLISH LAW ON THE BINDING EFFECT OF AN EQUITABLE ESTOPPEL ON SUCCESSORS IN TITLE UNDER THE TORRENS SYSTEM

- C In the light of the views that I have expressed on the doctrine of notice in the context of the NLC 1965 and the need to register or caveat the interests, as the case may be, of all the defendants I consider it necessary to examine the English law on the binding effect of an equitable estoppel on successors in title and their applicability locally. In my opinion, the acceptance in *Devi v Francis* [1969] 2 MLJ 169 of *Errington v Errington* [1952] 1 KB 290 — where it was held that the successor in title of a landowner is bound by the equity attached to the land — must be qualified in the light of indefeasibility of title provided by s 340 subject to the exceptions contained therein and the Torrens system of caveats. In this regard, I refer to the book entitled *Torrens Title in Australasia* by EA Francis (vol II) where the learned author says at p 219:
- E

Equitable estates and interests are not, however, express exceptions to the indefeasibility conferred on a registered proprietor of an estate or interest in land registered under the system and in general terms, it may be said that the equitable estates and interests which are recognized are those created by a registered proprietor himself and *that subject to certain exceptions* these will be extinguished when another person subsequently becomes registered as proprietor. Those equitable estates and interests which are created by a registered proprietor form the basis of the scheme of caveats which afford them temporary protection. (Emphasis added.)

F

- G The words which I have emphasized are irrelevant here as the NLC 1965 has provided for no such exceptions while its Australian counterpart does. The passage shows the effect of equitable estates and interests on successors in title under the Torrens system. Spencer Bower in his celebrated treatise entitled *Estoppel by Representation* (3rd Ed) having said at p 123 that:

- H In transactions relating to land, any person who derives title from, or takes an assignment from, or is let into possession by, or otherwise claims or 'comes in', under the actual representor, is bound by the same representation, and consequent estoppel, as that which binds such actual representor,

went on to explain the passage just reproduced at footnote 2 (pp 123–124) in its application to the Torrens system in this way:

- I While the statement of law printed in the text may still be regarded as generally acceptable, it is possibly open to criticism as being too wide in at least one respect, and it is submitted that consideration may require to be given to the case of persons who, while not in the actual occupation of land, yet claim to have by estoppel a licence to occupy it, as against a purchaser for value of the land without notice, actual or constructive, of the licence.

If the licensee is in occupation, such occupation will, subject to the provisions of the Land Charges Act 1925, operate as notice of his interest (*Hunt v Luck* [1902] 1 Ch 428), and a purchaser of the land will be bound accordingly, even if he has no actual notice (*Hopgood v Brown* [1955] 1 All ER 550); but if the licensee is not in occupation, and the purchaser for value is consequently deemed not to have notice, will he in the absence of actual notice be bound by the estoppel which would have bound his vendor?

The position is obscure. It is submitted that notwithstanding *Hopgood v Brown*, the better view may be that such a licensee by estoppel will fail against a purchaser for value without notice — see RH Maudsley, 'Licence to Remain on Land' 20 Conveyancer (NS) 281 and John Baalman, 'Title to Freehold by Estoppel' 29 ALJ 50.

In jurisdictions in which Torrens systems of land registration have been adopted, the foregoing observations must, of course, be modified, for the transferee who registers his transfer is secure upon completion of registration. (Emphasis added.)

Thus, in *Goh Swee Fang v Tiah Juah Kim* [1994] 3 SLR 881, the Singapore Court of Appeal held that as third parties had acquired indefeasible interests in the property by registration '... that transfer was also valid and ought to stand unaffected by the equity in favour of the respondent.' In *Bagdanovic v Koteff* (1988) 12 NSWLR 472, the then registered proprietor Koteff promised that if the widow of one of his friends stayed in the house and looked after him, she could live there until she died. Koteff then died and his heir became registered as the proprietor of the land. The widow claimed that either: (i) the property was held on trust for her on terms that she was entitled to reside there until she died; (ii) she was beneficially entitled as a tenant in common; or (iii) she had an irrevocable licence to remain in the property until she died. The court held that she had an interest in the land but did not specify its nature, as it had been defeated by the registration of the heir as proprietor. This approach may appear to conflict with the Federal Court decision in *Yong Tong Hong v Siew Soon Wah & Ors* [1971] 2 MLJ 105, affirmed by the Privy Council, where the equity of the tenants was held to be binding on the successor in title of the landlord. In this regard, Ong CJ (Malaya) said in the Federal Court at p 108:

I need hardly add that the respondents take the premises subject to the agreement which binds their predecessor in title to give the appellant a lease of the premises: see again, *Inwards v Baker* at p 217.

However, the facts of the case reveal that there is no such conflict. It is important to remember that as Ong CJ (Malaya) said in *Yong Tong Hong* itself every case must be decided according to its own peculiar facts. In that case the new landlord based his action against the tenant on the notice to quit issued by his predecessor in title and the agreement between them and the trial proceeded on that basis. The new landlord had therefore elected to place himself in the shoes of his predecessor in title. The issue for determination in that case was whether any written agreement was made as alleged; and if so, whether it was valid and enforceable. Furthermore, the person to whom the land was transferred was the son of the original landlord and the judgment of the court does not show that any consideration was paid for the transfer. In such circumstances, the tenant

- A is entitled to an order of specific performance against the new landlord as he is a volunteer and is not protected by s 26(b) of the Specific Relief Act 1950 as the protection afforded under that section is only to a bona fide purchaser for value without notice. In this regard, I refer to the *Law of Specific Relief* by Banerjee (10th Ed) where in the commentary on s 19 of the Indian Specific Relief Act 1963 — which is similar to our s 26(b) — it is stated at p 296:
- B

If the subsequent transferee has given no consideration and is a mere volunteer, he has no right against the first promisee.

- Thus s 340 was not in issue and the reliance by the Federal Court and the Privy Council on estoppel and *Inwards v Baker* was, with respect, unnecessary and therefore obiter. As Edgar Joseph Jr SCJ (as he then was) succinctly stated in *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352 at pp 401–402:
- C

- In their excellent work on *Equity Doctrines and Remedies* (3rd Ed, 1992) at p 433 para 1728, Meagher, Gummow and Lehane have an interesting commentary on the case of *Siew Soon Wah & Ors v Yong Tong Hong*. What they say is this:
- D

‘As the law stands, even within the rubric of estoppel, there is scope for considerable confusion.

- The Privy Council decision in *Siew Soon Wah v Yong Tong Hong* is a striking example. There the father of the plaintiffs allegedly agreed to let certain premises to the defendant in consideration not only of rent but also of a lump sum payment. The reversion was then transferred to the plaintiff (whether for value and with notice does not appear clearly from the report on appeal or below [1971] 2 MLJ 105 at p 108) and they sought to eject the defendant; he counterclaimed for specific performance. The first issue was to determine whether there was any lease and whether it had properly been determined. The Privy Council, in finding for the defendant, held (a) the arrangement was not so vague and uncertain as to be void for uncertainty; (b) although there was no registrable instrument as required by the relevant legislation, the defendant had a counterclaim for specific performance which was a good answer to the claim of the plaintiffs: *Zimbler v Abrahams* [1903] 1 KB 577. That would appear quite sufficient to dispose of the case. But, Viscount Dilhorne for the Privy Council then went on [1973] AC 836 at p 845) to cite *Inwards v Baker* [1965] 2 QB 29, and to restate his conclusion as that ‘there arose in the (defendant’s) favour an equity or equitable estoppel protecting his occupation ... because the defendant had paid the lump sum and rent thereafter in accordance with his alleged lease. This holding, as appears from the above, was unnecessary for the conclusion, and productive of confusion. For it has always been assumed that performance of contractual obligations cannot amount to self-detrimental conduct induced by the other party and thus raising an estoppel against him. The truth of the matter is that estoppel would have been relevant in this case only if their Lordships had held the arrangement void at law for uncertainty so that there was no agreement of which specific performance might be decreed. Granted there was such agreement, to add estoppel as a ground for decision is to supply a third wheel to the chariot.’
- E
- F
- G
- H
- I

It is difficult to find fault with the learned author's comments and I would respectfully concur in their view that the Privy Council, having found that the arrangement relied on by the tenant was not so vague and uncertain as to be void for uncertainty, and although there was no registrable instrument for the purposes of the NLC 1965 or its predecessor, the Land Code (Cap 138), the tenant had counterclaimed and so this was sufficient answer to the landlords' claim for possession. Obviously, these findings were all that was required for the decision in favour of the tenant. Therefore, in going further and adding estoppel as a further ground for the decision, their Lordships, and in the court below, the Federal Court, were really supplying 'a third wheel to the chariot'. *This would appear to have been unnecessary and so, whatever was said on estoppel would be obiter.* (Emphasis added.)

Accordingly, I feel free to comment on the binding effect of an equity on a successor in title based on the law laid down in *Yong Tong Hong v Siew Soon Wah* [1971] 2 MLJ 105 in following *Inwards v Baker*. It must be noted that in the latter case, it was held that the equity would be binding only when a purchaser took 'with notice' of the interest. This was emphasized in *Binions v Evans* [1972] 2 All ER 70. It must be stressed that the equity is not binding on a purchaser for value without notice (see *National Provincial Bank Ltd v Ainsworth* [1965] 2 All ER 472. I interpolate to add that in England there is a distinction between registered and unregistered dealings in land. Both these systems run parallel to one another and have their own rules of notice. Where an interest is registrable as a land charge, failure to register it will make it void against a purchaser and the equitable rules of notice will have no application. As Oliver J said in *Taylor's Fashions Ltd v Liverpool Trustees Co* [1982] QB 133 at p 142:

The Land Charges Act 1925 (which was the statute in force at the material time) was concerned with the registration of interests in land or equitable burdens on land and was designed to substitute registration as a land charge for the equitable doctrine of notice in those cases where, prior to 1925, the binding effect of the interest on a subsequent purchaser depends upon notice.

In this regard, I refer to *ER Ives Investments Ltd v High* [1967] 1 All ER 504 where Lord Denning MR said at p 508:

The next question is this: was that right a land charge such as to need registration under the Land Charges Act 1925? For if it was a land charge, it was never registered and would be void as against any purchaser (see s 13 of the Act of 1925). It would, therefore, be void against the plaintiffs, even though they took with the most express knowledge and notice of the right.

Winn LJ said at p 514:

Such equities as arise from merely standing by whilst expenditure is incurred under a mistake of fact or law, or from attempts both to approbate and reprobate a deed, always supposing them to be capable of registration, which is I think on the whole an open question, may not survive the lethal effect of the Land Charges Act 1925, unless they have been registered. On the other hand, I cannot see that the statute has any impact on an estoppel, nor do I think that an estoppel could be registrable under its provisions.

Thus even in England, the equitable doctrine of notice is applicable to an equitable estoppel only because the estoppel is not registrable as a land charge. If it is registrable as a land charge, then in the absence of it being

- A registered, it would be void against a purchaser even though he had the most express knowledge and notice of the right. However, as I have said in an earlier part of the judgment, the English rules of notice which constituted the basis of the judgment in *Inwards v Baker* have been replaced here with the caveat system which has the same effect as the law relating to a registrable land charge under English land law. As concluded by me earlier, an equitable estoppel is caveatable in this country thereby rendering the equitable rules of notice inapplicable. To that extent, the law enunciated in *Inwards v Baker* is incompatible with the NLC 1965 just as it is with the English system of registration. It can harmonize with our law only when the English rules of notice referred to therein are substituted with the NLC 1965 provisions regarding caveats and the resultant rules of notice. It is indeed an anomaly to introduce into our system of land dealings a doctrine which is inapplicable in its country of origin to registrable land dealings. Thus the pronouncement in *Yong Tong Hong* on the binding nature of an equity is based on the assumption that the English rules of notice are applicable locally when they are not. Accordingly, even if the statement by the Federal Court, based on *Inwards v Baker*, can be said to amount to a ratio decidendi, it has been merely assumed to be correct without argument on the relevant provisions of the NLC 1965. It has been said as long ago as 1661 that 'precedents *sub silentio* and without argument are of no moment' (see *R v Warner* 1 Keb 66). In *Baker v R* [1975] AC 774 the Privy Council held that although inferior courts were bound by decisions of superior courts even if they were per incuriam, they were not bound by propositions of law incorporated into the ratio decidendi which had merely been assumed to be correct without argument. In this regard, it is stated in *Precedents in English Law* by Cross and Harris at p 159:
- F The last 15 years have seen a tendency to regard decisions as not binding at any level of the judicial hierarchy as to propositions expressly affirmed by them if, owing to the absence of any argument on the point, it can be inferred that the deciding court merely assumed their correctness. In this light decisions without argument must be viewed as a general exception to stare decisis.
- G It is therefore my view that the statement in *Yong Tong Hong* on the binding effect of an equity on a successor in title must be interpreted in the context of the local law relating to indefeasibility of title provided by s 340 of the NLC 1965 subject to the exceptions contained therein and the Torrens system of caveats. I must also add that none of the defendants can avail themselves of the remedy of specific performance pursuant to s 26(b) of the Specific Relief Act 1950 to affect the claim of the plaintiff. The section reads as follows:
- H 26 Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against:
- I (a) either party thereto;
(b) any other person claiming under a party to the contract by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract ...

This section is modelled on the Indian Specific Relief Acts where, as held in *Tilakdhari Lal & Anor v Khedan Lal & Others* AIR 1921 PC 112, notice

cannot in all cases be imputed from the mere fact that a document is to be found upon the Indian register of deeds. It follows that the doctrine of equitable notice is applicable in India. However, as I said earlier, such rules are incompatible with the NLC 1965. Thus the section must be interpreted in the context of the local law. To my mind, the words '... without notice ...' in that section do not mean equitable notice but notice within the meaning of the NLC 1965 as described by me in an earlier part of the judgment. Section 3(c) of the Specific Relief Act 1950 itself provides that except where it is otherwise expressly provided nothing in the Act shall be deemed to affect the operation of any law in force for the time being relating to the registration of documents. As the NLC 1965 provides for registration of titles, interests and entry of caveats the rules of notice flowing from them cannot be overridden by the equitable rules of notice. In the premises, the failure of the defendants to lodge caveats in respect of their interests means that the plaintiff had no notice of them with the result that he being a bona fide purchaser for value is protected.

NOTICE TO TERMINATE AN EQUITY

The final matter that requires to be addressed is the need for and the form of notice to quit to be given in cases of this nature. Salleh Abas FJ (as he then was) said in *Mok Deng Chee v Yap See Hoi & Ors* [1981] 2 MLJ 321 — after referring to *Khew Ah Bah v Hong Ah Mye* [1971] 2 MLJ 86 — that where there is an equity '... the tenant's equity was not defeated by a bare notice to quit ...'. Whether these words mean that the notice to quit must also contain an offer of compensation or any other method of satisfying the equity is resolved by the judgment in *Khew Ah Bah* itself where Choor Singh J said at p 88:

In such a case the landlord cannot recover possession of his land by merely terminating the tenancy; he must also satisfy the equity.

This must be read with the statement of the law in *Inwards v Baker* [1965] All ER 446 where Lord Denning MR said at p 449:

It is for the court to say in which way the equity can be satisfied.

Thus the manner of satisfying the equity is a matter for the court to decide on the evidence adduced. In my opinion it is not necessary for the person giving a notice to quit to specify in it the manner of satisfying the equity for two reasons; firstly, that is a matter for the court to decide; and secondly, as the equity in most of the cases before the courts is denied by the plaintiffs it is ludicrous to expect them to specify in the notice to quit the manner of satisfying the equity as that would amount to an admission of the equity by them. It must be remembered that there is no universal rule that an equitable arrangement must always be determined in one way (see *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co* [1955] 2 All ER 657). Accordingly, the view expressed in *Mok Deng Chee* that an equity is not defeated by a bare notice to quit simply means that in order to obtain vacant possession the termination of the tenancy is effective only when the equity, as ordered by the court, is satisfied following the notice. As to the length of notice that is required: see *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352. As I have held that the plaintiff is not bound by the interests of all the defendants, they are in

- A unlawful occupation of the lands — that is to say, they are trespassers or, at the most, bare licensees. Such occupation can be determined by a demand for possession (see *Ho Hing Chye v Teh Cheong Huat* [1965] 2 MLJ 261). The service of the summons in this case is itself sufficient to terminate the licence (see *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 221). In any event the two notices to quit dated 7 December 1994 suffice to terminate the rights of all the defendants.
- B

THE DEFENDANTS' REMEDY AGAINST LLT

- This determination does not mean that all the defendants are left without any remedy. They have a right in personam against LLT. A registered proprietor cannot rely on the indefeasibility of title which registration has secured to defeat rights in personam (at law or in equity) which he has created or subject to which the interest has been taken provided that the right in personam will be enforced by the courts (see *Phillips v Martin* (1890) LR (NSW) 153 and *Barry v Heider* (1914) 19 CLR 197). The court will enforce against a registered proprietor any contracts and trusts which he has created. With regard to the rights of an equity holder, Thomson J (as he then was) said in *Bachan Singh v Mahinder Kaur* [1956] MLJ 97 at pp 97–98:
- C
- D

- To my mind, many of the difficulties which appear to arise in these cases would not arise if we were to bear in mind throughout the distinction between rights ad rem or personal rights and rights in rem or real rights. Where there is a valid binding contract for the sale of land, the purchaser, when he has performed his side of the contract, acquires a right ad rem which is also a right in personam. In other words, he acquires a right to the land as against the vendor personally but not good against the world as a whole and, in due course, that right can become a real right good against the world as a whole on registration in accordance with the Land Code which has the same effect in our law as appearance before the Praetor in the law of Rome, delivery of seisin in the old English feudal law and infetment by registration in the Registrar of Sasines in the modern Scots law.
- E
- F

- The definitive statement on this issue is that of Lord Wilberforce in *Frazer v Walker* [1967] 1 All ER 649, where his Lordship said at p 655:
- G

- ... registration under the Land Transfer Act 1952, confers on a registered proprietor a title to the interest in respect of which he is registered which is ... immune from adverse claims, other than those specifically excepted. In doing so they wish to make clear that this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant.
- H

- In *Margaret Chua v Ho Swee Kiew & Ors* [1961] MLJ 173, the Court of Appeal referred to the Johore case of *Alagappa Chetty v Ng Guan Yin* 5 FMSLR 236, where Brown J said with reference to an agreement for the sale of land which could not be registered (at p 241):
- I

The correct view of the effect of such a transaction in the Federated Malay States (and therefore in Johore) appears to be that, not being recognized by the law relating to registration of title, it can operate as a contract and may therefore give rise in appropriate circumstances to a decree for specific

performance against the proprietor of the land but cannot create anything in the nature of an incumbrance on the land itself. A

Specific performance of the defendants' equity is not possible in view of the indefeasible title of the plaintiff in the absence of any case being put forward to render the title defeasible as provided by s 340. The defendants' remedy is therefore only against LLT for damages. B

In concluding the judgment, I refer to WA Lee's observations on *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694 in 5 *University of Queensland Law Journal* (1965-66) at p 217:

The essential concern of equity is remedy where needed. In some contexts equity allows a bundle of remedies so cohesive and purposeful that the rights which they protect take on the appearance of an institution or of interests in property. To require of equity however that it should at all times underwrite a proprietary system is to forget its origins and to pervert its destiny. C

CONCLUSION D

In the light of the foregoing my answers to the issues framed by the parties are as follows:

ISSUE NO 1

The plaintiff is not bound by the equities of the third, fourth and fifth defendants. E

ISSUE NO 2

The first and second defendants do not have any equity on the portion of the lands occupied by them. Even if the first defendant did have an equity, it has been satisfied or, alternatively, it has been extinguished upon the registration of the plaintiff as the registered proprietor. F

ISSUE NO 3

The sixth defendant has no legal right of access to the temple nor a legal right to remain there for religious purposes. G

ISSUE NO 4

The notices dated 7 December 1994 issued by the plaintiff's solicitors are sufficient to terminate the interests of the defendants. H

ISSUE NO 5

As the plaintiff is not bound by the equities of the defendants this issue does not require consideration. I

In the upshot, I allow the plaintiff's claim with costs.

Claim allowed.